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A SELECTION OF CASES

ON

THE LAW OF TRUSTS

WITH NOTES AND CITATIONS

SECOND EDITION

BY

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CASES ON TRUSTS.

CHAPTER I.

THE NATURE AND REQUISITES OF A TRUST.

SECTION I.

A Trust distinguished from a Debt.

ANONYMOUS.

IN THE COMMON PLEAS, HILARY TERM, 1405.

[*Reported in Year Book* 6 *Henry IV., folio* 7, *placitum* 33.[1]]

DEBT against a parson and counted by Tillesley that he and his predecessors, etc., had been seised of an annual rent of forty shillings issuing out of a manor, which came into the hands of the King, and he by letters patent leased the manor to one who delivered the forty shillings to the defendant to pay to us, and so action accrued to us.

HANKFORD, J. You will maintain your action because the farmer of the King delivered the forty shillings to the defendant to deliver to you, and I think this cannot maintain your action, for if one delivers certain moneys to you to pay to me, I shall have a writ of Account against you,[2] and not a writ of Debt, because there is no contract between you, and so in this case.

Tillesley. I think I may elect to have Account or Debt.

THIRNING, C. J. If one took the rent from your tenants would you have Debt?

Tillesley. Not there, but I should have Trespass.

THIRNING, C. J. [?] I suppose that if he took it by your command, you would not have Debt, but Account, for there is no contract between you, and so here.[3]

---

[1] The case is somewhat abridged. — ED.

[2] 32 Ed. III., Fitz. Ab. Acct. 108; Y. B. 1 Hen. V. 11–21; Y. B. 36 Hen. VI. 9, 10–5; Y. B. 18 Ed. IV. 23-5; Y. B. 1 Ed. V. 2–2; Robsert *v.* Andrews (1587), Cro. El. 82, 2 Leon. 118, pl. 160, 3 Leon. 149, pl. 199, s. c.; Huntley *v.* Griffith (1590), Gold. 159, per Altham, B.; Harrington *v.* Deane (1612), Hob. 36, Brownl. 26, s. c.; Baynton *v.* Cheek (1652), Style, 353 *Accord.* — ED.

[3] Y. B. 41 Ed. III. (1367), 10–5. *Candish:* "If I deliver certain money to you to deliver to John, he shall have a writ of Account, because the property is in him straight-

ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1429.

[*Reported in Year Book* 8 *Henry VI., folio* 10, *placitum* 25.]

DEBT upon arrears of account. The plaintiff was examined by the statute, and it was found that the account was because the defendant had bought certain goods of the plaintiff, and had accounted for the money before the auditors. And because this does not lie in Account, the plaintiff was ordered to amend his count or the defendant should be dismissed. And so he did, and declared upon a contract.[1]

PASCHALL *v.* KETERICH.

IN THE KING'S BENCH, MICHAELMAS TERM, 1557.

[*Reported in Dyer*, 151*b*, *placitum* 5.[2]]

NOTE, By the opinion of all the Justices of each bench, where a man devised by his last will and testament in writing that his executors should sell his land, and that his daughter should have a portion of the money for her advancement, and so of other things a sum certain, and died, and his executors made sale, and would not pay the legacies, wherefore the daughter sued execution in the Court Christian, prohibition well lies in this case, because it is not a legacy testamentary, but out of land, by reason of the last will, in the performance whereof the Court Christian had no concern; but the party may well have an action of account at common law.[3] See the contrary opinion, T. 9 Eliz., Dy. 264, b.

---

way upon your receipt by my hand, and he cannot have an action of Debt." Bellewe, Acct. 7 (1379). Belknap, C. J.: "If I am debtor to Sir Henry Persay in £20 and I bail the money to J. Holt to pay the money to him, if J. Holt does not pay the money, he shall have an action of Account against him, and no other action." Anon., Keilw. 77*a*, 77*b* *Accord.*

A bill in equity may be brought at the present day by him to whose use the money was delivered. Hosmer *v.* Jewett, 6 Ben. 208. — ED.

[1] Y. B. 49 Ed. III. 7-11 *Accord.* — ED.

[2] Benl. 60, s. c. — ED.

[3] See to the same effect, Shep. Touch. (7th ed.), 458; Dens *v.* Dens, 1 Bulst. 153, per Yelverton, J.; Jenk. Cent. Cas. 215, pl. 56; *semble* Account lies in this case for the daughters at common law, against the executors, for the money is received by them to the use of the said daughters." In more recent times Account has given way to *Indebitatus Assumpsit* for money had and received by the devisee to the use of the beneficiary (Nicholson *v.* Sherman, 1 Sid. 45. 46; Buttrick *v.* King, 7 Met. 20;

WALKER *v.* COLLIER.

IN THE COMMON PLEAS, HILARY TERM, 1595.

[*Reported in Croke Elizabeth*, 379.[1]]

TRESPASS. Upon a special verdict the case was, The land was devised to one for life, remainder to the plaintiff, *paying* five and forty shillings to John S., and it was found that the land was worth three pounds per annum. The tenant for life died; and, Whether the plaintiff had thereby a fee, or for life? was the question. And all THE COURT resolved, without any great argument, that he should have it in fee, especially when the money is not appointed to be annually paid. And ANDERSON said, that this word "paying" made his estate conditional: but the not finding whether it was paid is not material; no more is the finding of the value. Wherefore it was adjudged *ut supra* for the plaintiff.[2]

Rogers *v.* Daniell, 8 All. 343; Lynde *v.* Davenport, 57 Vt. 597); or to a bill in equity; Edwards *v.* Graves, Hob. 265.

The proceeds of the sale are not legal, but equitable assets. Germy's Case, 1 Leon. 87, 2 Leon. 119; Barker *v.* May, 9 B. & C. 489, 4 M. & Ry. 386; Perkins *v.* Lewis, 41 Ala. 649; Harland *v.* Person (Ala. 1891), 9 S. R. 379; Williams *v.* Nichol, 47 Ark. 254; Olmstead *v.* Brush, 27 Conn. 530; Gregg *v.* Currier, 36 N. H. 200; Conklin *v.* Egerton, 21 Wend. 430, 25 Wend. 224; Ross *v.* Barclay, 18 Pa. 179.

[1] 6 Rep. 16 a, s. c. — ED.

[2] Doe *v.* Richards, 3 T. R. 356; Doe *v.* Holmes, 8 T. R. 1; Goodtitle *v.* Maddern, 4 East, 496; Funk *v.* Eggleston, 92 Ill. 515, 534; Lindsay *v.* McCormick, 2 A. K. Marsh. 229, 232; Wait *v.* Belding, 24 Pick. 129, 139; Jackson *v.* Bull, 10 Johns. 148 (*semble*); Jackson *v.* Martin, 18 Johns. 31; Spraker *v.* Van Alstyne, 18 Wend. 200; King *v.* Cole, 6 R. I. 584.

In Doe *v.* Holmes, *supra*, Lord Kenyon said, p. 2: "In cases of this kind the question has always been whether the charge is to be paid only out of the rents and profits of the estate? or, whether it is to be paid by the devisee at all events? In the former case the devisee only takes an estate for life; but in the latter, he takes a fee, otherwise he might be a loser by the devise." By statute the devisee now takes a fee almost everywhere without words of inheritance.

Where land is devised, as in the principal case, to A, "he paying," or "on condition that he pay," a certain sum of money to B, B acquires a twofold right, the one an equitable charge upon the land, the other a money claim against A. And this claim against A is enforced at common law by an action of Debt, or *Indebitatus Assumpsit*, although B was a stranger to the transaction. Ewer *v.* Jones, 2 Ld. Ray. 937, 2 Salk. 415, 6 Mod. 26; Webb *v.* Jiggs, 4 M. & Sel. 119; Braithwaite *v.* Skinner, 5 M. & W. 313; Harland *v.* Person (Ala. 1891), 9 S. R. 379; Williams *v.* Nichol, 47 Ark. 254; Millington *v.* Hill, 47 Ark. 301; Lord *v.* Lord, 22 Conn. 595; Olmstead *v.* Brush, 27 Conn. 530; Porter *v.* Jackson, 95 Ind. 210; Felch *v.* Taylor, 13 Pick. 133; Adams *v.* Adams, 14 All. 65; Prentice *v.* Brimhall, 123 Mass. 291, 293; Smith *v.* Jewett, 40 N. H. 530, 535; Gridley *v.* Gridley, 24 N. Y. 130; Loder *v.* Hatfield, 71 N. Y. 92; Brown *v.* Knapp, 79 N. Y. 136; Yearly *v.* Long, 40 Oh. St. 27; Etter *v.* Greenawalt, 98 Pa. 422; Jordan *v.* Donahue, 12 R. I. 199 (*semble*). In Zimmer *v.* Sennott, 134 Ill. 505, there was said to be a claim against the devisee, but no equitable charge upon the land. — ED.

CLARK'S CASE.

In the Common Pleas, Michaelmas Term, 1612.

[*Reported in Godbolt*, 210.]

Note it was said by Cook, C. J., and agreed by the whole Court, and 41 and 43 E. 3. &c. That if a man deliver money unto I. S. to my use, that I may have an action of Debt,[1] or Account against him for the same, at my election.

PETER HARRIS *v.* PETER DE BERVOIR.

In the King's Bench, Trinity Term, 1624.

[*Reported in Croke James*, 687.]

Debt; supposing that one *Squire* delivered to the defendant one hundred pounds to pay to the plaintiff, and that he had not paid it to the plaintiff: wherefore he brought this action.

After verdict, upon *non debet*, it was moved in arrest of judgment, that debt lies not; for there never was any contract betwixt the plaintiff and defendant, nor any delivery of the money by the plaintiff to the defendant, and therefore no action of *debt* lies: yet peradventure he might have account upon this receipt; but no other action. But it was agreed, that the bailor (if the money be not delivered to him to whom it ought to be delivered) may have action of *debt* or *account* at his election;[2] but he to whose use the bailment was made shall have *account* only.

Damport, *for the plaintiff*, agreed, that if money be delivered to another to deliver to *J. S.* or to the use of *J. S.* there *J. S.* shall not have action of *debt* but *account* only. But when it is delivered (as it is here) *solvend* to *J. S.* which is intended in satisfaction of a debt, there it is not countermandable; and he who is to receive it as a debt may upon this receipt have an action of *debt* or *account*. And to this purpose the record of a judgment was shown in *Trinity Term*, 13 *Jac.* 1, in the common pleas, *Greenvile* v. *Slaning* in debt, supposing that *George Greenvile* delivered such a sum to be paid to the plaintiff; and for non-payment debt was brought; and adjudged for the plaintiff. *Vide* 28 *Hen.* 8; *Dyer*, 21; 41 *Edw.* 3, *pl.* 10. 28 *Edw.* 3, "*Debt*," 146, that the bailor may have debt or account; but not that *cesty que use* shall have that action. But 36 *Hen.* 6, *pl.* 10, & 39 *Hen.* 6, *pl.* 44, are, that *cesty que use* the delivery is made may have debt or account.

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[1] Y. B. 36 Hen. VI. 9, 10–5 (1467), per *Wangford*; Rast. Ent. (1540), f. 159, Dett. 1; Shaw *v.* Sherwood (1599), Cro. El. 729, Dy. 350 n. (20), Moore, 667, Ow. 127; affirmed Yelv. 25, Brownl. 82; Atkin *v.* Barwick (1718), 1 Stra. 165, 166, per Eyre, J. *Accord.* — Ed.

[2] Y. B. 19 Hen. VI. 69, A–14; Y. B. 20 Hen. VI. 35, A–4 (but see, *contra*, Y. B. 19 Hen. VI. 5, B–10); Britton *v.* Barnet, Noy, 72, Owen, 86, s. c.; Barkby *v.* Forster, Moore, 458; Lincoln *v.* Topcliff, Cro. El. 644, Noy, 72, s. c.; Brown *v.* London, Freem. 14, 1 Lev. 298, s. c. *Accord.*

Similarly, if the defendant, who has received money to the use of X, seeks to excuse its non-delivery to X by reason that it was lost, he is chargeable to the plaintiff in debt. Parry *v.* Roberts, 3 A. & E. 118. See also Remon *v.* Hayward, 2 A. & E. 666. — Ed.

And of that opinion were DODERIDGE and LEA: wherefore rule was given that judgment should be entered for the plaintiff, unless other cause, &c. *Vide* 21 *Hen.* 7, *pl.* 7.

LINCOLN *v.* PARR.

IN THE KING'S BENCH, TRINITY TERM, 1671.

[*Reported in* 2 *Keble*, 781.]

THE court declared their opinion that no evidence of account will maintain *Indebitatus* as on money delivered to a factor, who often have discharges of greater value, and so involve the court, which they will not allow. *Ex motione* Winnington to alter *visn*, and it was said so to be ruled in Guildhall last sitting.[1]

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[1] Speake *v.* Richards (1617), Hob. 206. Per Curiam: "The action of account is necessary, where the first receipt *ab initio* was directed to a merchandizing, which makes uncertainty of the neat remain till account finished; or where a man is charged as bailiff of a manor, or the like, whereupon the certainty of his receipt appears not till account; yet even in the case of merchandizing an action of Debt will lie for the summ received before the merchandize, yea and after the merchandize, for so much as he hath not so imployed; and therefore if I deliver an 100 pounds to one to buy cattle, and if he bestow 50 pounds of it in cattle, and I bring an action of debt for all, I shall be barred in that action for that money bestowed and charges, &c., but for the rest I shall recover."

Hussey *v.* Fiddall (1699), 12 Mod. 324. Holt, C. J.: "Keyling, Chief Justice [1665-1671], would allow *Indebitatus* against a receiver or factor, but Hale, Chief Justice [1671-1676], would not."

Anonymous (1706), 11 Mod. 92. "Powell, J. If I give money to another to buy goods for me, and he neglects to buy them, for this breach of trust I shall have election to bring debt or account; and cited four or five cases. Holt, C. J., *contra.* If the party did not take it as a debt, but *ad computandum*, or *ad merchandizandum*, it must be an account, and he shall have the benefit of an accountant; which is, he may plead, being robbed, which shall be a good plea in the last case, and not in the first." — ED.

FARRINGTON *v.* LEE.

IN THE COMMON PLEAS, TRINITY TERM, 1677.

[*Reported in* 2 *Modern Reports*, 268.]

THE COURT. Whereas it has been said by Serjeant Newdigate, that the plaintiff here has an election to bring an action of account, or an *indebitatus assumpsit*, that is false; for till the account be stated betwixt them, an action of account lies, and not an action upon the case. — When the account is once stated, then an action on the case lies, and not an action of account. — And by North, C. J. If upon an *indebitatus assumpsit* matters are offered in evidence that lie in account, I do not allow them to be given in evidence.[1]

KEY *v.* GORDON.

IN THE KING'S BENCH, EASTER TERM, 1701.

[*Reported in* 12 *Modern Reports*, 521.]

INDEBITATUS ASSUMPSIT by an under officer against his Colonel for his pay.

HOLT, C. J. If one receive money to the use of another, an *indebitatus* is a proper remedy for it;[2] but if in this case there were any legal deduction to be made by the Colonel, the remedy had been account; for where one receives money, and has no way to discharge himself of it but payment over, an *indebitatus* will lie.

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[1] S. C., Freem. 230: "And per NORTH. There is a great deal of difference between this action [*Indebitatus assumpsit*] and that of Account; for it was resolved by all the judges in the case of Sir Paul Neal, that, in all accounts where allowances are to be made, no action on the case will lie, but an Account must be brought, which is the proper action." 2 Mod. 311, S. C. — ED.

[2] Gilbert *v.* Ruddeard (1607), Dy. 272 a, n. (32); Beckingham *v.* Lambert (1616), 1 Rolle, R. 391; Tenant *v.* Elliott, 1 B. & P. 3; Farmer *v.* Russell, 1 B. & P. 296; Moody *v.* Spencer, 2 D. & Ry. 6; De Bernales *v.* Fuller, 14 East, 590, n. (a); Lilly *v.* Hays, 5 A. & E. 548; Vincent *v.* Rogers, 30 Ala. 471, 475 (*semble*); Seals *v.* Holloway, 77 Ala. 344; Lewinshon *v.* Edwards, 79 Ala. 293; Crocker *v.* Higgins, 7 Conn. 342, 348 (*semble*); Johnson *v.* Collins, 14 Iowa, 63; Owings *v.* Owings, 1 Har. & G. 484 (*semble*); Putnam *v.* Field, 103 Mass. 556; Fay *v.* Sanderson, 48 Mich. 259; Wentworth *v.* Gove, 45 N. H. 160; Nolan *v.* Manton, 46 N. J. 231 (*semble*); Weston *v.* Barker, 12 Johns. 276; Wyman *v.* Smith, 2 Sandf. 331; Murdock *v.* Aikin, 29 Barb. 59; Ross *v.* Curtis, 30 Barb. 238; Chapman *v.* Forbes, 123 N. Y. 532; Middleton *v.* Twombly, 125 N. Y. 520; Draughan *v.* Bunting, 9 Ired. 10; White *v.* Hunt, 64 N. C. 496; Aycinena *v.* Peries, 6 Watts & S. 243; Zacharias *v.* Zacharias, 23 Pa. 452; Hostetter *v.* Hollinger, 117 Pa. 606 *Accord.*

So where property is given by A to B to convert into money and pay the same to C, C may charge B, if at all, by an action of *indebitatus assumpsit* for money had and received. Walker *v.* Rostron, 9 M. & W. 411; Hitchcock *v.* Lukens, 8 Port. (Ala.) 333; Kreutz *v.* Livingston, 15 Cal. 344; Lockwood *v.* Canfield, 20 Cal. 126; Miller *v.* Billingsly, 41 Ind. 489; Hall *v.* Marston, 17 Mass. 575; Fitch *v.* Workman, 9 Met. 517; Fitch *v.* Chandler, 4 Cush. 254 (*semble*); Mellen *v.* Whipple, 1 Gray, 317, 322

POULTER *v.* CORNWALL.

IN THE QUEEN'S BENCH, TRINITY TERM, 1706.

[*Reported in* 1 *Salkeld*, 9.]

INDEBIT. assumpsit for money received *ad computandum.* Verdict *pro quer.*, and moved in arrest of judgment, that this action did not lie, but account: for if a man receives money to a special purpose, as to account, or to merchandize, it is not to be demanded of the party as a duty, 'till he has neglected or refused to apply it according to the trust under which he received it: and the declaration must shew a misapplication, or breach of trust. *Et per Cur.* The verdict has aided this declaration, for it must be intended there was proof to the jury, that the defendant refused to account, or had done somewhat else that rendered him an absolute debtor.[1]

DALE *v.* SOLLET.

IN THE KING'S BENCH, NOVEMBER 17, 1767.

[*Reported in* 4 *Burrow*, 2133.]

THIS was an action for money had and received to the plaintiff's use: *non assumpsit* was pleaded; and issue joined.

CASE. — The defendant, a ship-broker, was the plaintiff's agent in suing for and recovering a sum of money for damages done to the plaintiff's ship: and did recover and receive 2,000*l.* for the plaintiff's use: and paid him all but 40*l.* which he retained for his labour and service therein; which the witness (Mr. *Fuller*) swore he thought to be a reasonable allowance. And the jury were of opinion "that the defendant ought to retain 40*l.* as a reasonable allowance." Consequently, the plaintiff was not intitled to recover.

The plaintiff objected, at the trial, "That the defendant could not give *evidence* in this manner, of this labour and service; but *ought to*

(*semble*); Frost *v.* Gage, 1 All. 262; Catlin *v.* Birchard, 13 Mich. 110; Delaware Co. *v.* Westchester Bank, 4 Den. 97; Hutchings *v.* Miner, 46 N. Y. 456 (*semble*); Winslow *v.* Fenner, Phill. (N. C.) 565; Fleming *v.* Alter, 7 S. & R. 295; Stoudt *v.* Hine, 45 Pa. 30; Drake *v.* Whaley (S. Ca.), 14 S. E. R. 397; Phelps *v.* Conant, 30 Vt. 277; Miller *v.* Lake, 24 W. Va. 545 (*semble*).

The plaintiff may of course proceed in such case by a bill in equity. Hooper *v.* Holmes, 3 Stock. 122; Miller *v.* Lake, 24 W. Va. 545. — ED.

[1] Buchanan *v.* Parker, 5 Ired. 597 *Accord.* — ED.

have PLEADED *it* by way of SETT-OFF, or at least have given *notice* of it as a *sett-off*.”

A verdict was found for the plaintiff; subject to the opinion of this Court: and if the Court should be of opinion against him, then judgment to be entered as upon a *nonsuit*.

Accordingly, on *Tuesday* last, (the 10th instant,) Mr. *Dunning* moved on behalf of the defendant, “that judgment might be entered against the plaintiff, as upon a nonsuit:” and had a RULE to shew cause.

Sir *Fletcher Norton*, on behalf of the plaintiff, now shewed cause; and insisted that the defendant ought either to have *pleaded* it, or given *notice* of a sett-off: but that he could not take advantage of it in *this* manner, *without* either plea or notice.

LORD MANSFIELD had no doubt of the defendant's being at liberty to give this evidence.

This is an action for money had and received to the plaintiff's use. The plaintiff can recover no more than he is in conscience and equity entitled to: which can be no more than what *remains after deducting* all just allowances which the defendant has a right to retain *out of the very sum demanded*. This is not in the nature of a *cross*-demand or *mutual* debt: it is a CHARGE, which makes the *sum* of money received for the plaintiff's use so much *less*.

The TWO *other* JUDGES concurred.

PER CUR'. *Judgment for the defendant, as on a nonsuit.*[1]

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[1] Lord Mansfield's innovation, sanctioning the use of *Indebitatus assumpsit* against a defendant, who is entitled to allowances in the way of commissions and expenses, has been almost everywhere followed. It is impossible for the plaintiff in such a case to prove his allegation that the defendant is indebted to him, as has been pointed out by Professor Langdell in 2 Harvard Law Review, 253–257; but the great convenience of this common count, as compared with the action of account, or a bill in equity, the legitimate substitute therefor, has led the courts to shut their eyes to this objection. Accordingly *Indebitatus assumpsit* has been allowed against a

Factor. — Zinck *v.* Walker, 2 Blackst. 1154; Tomkins *v.* Willshear, 5 Taunt. 431 (*semble*); Arnold *v.* Webb, 5 Taunt. 432 n. (a), (*semble*); Judah *v.* Dyott, 3 Blackf. 324; Perry *v.* Smith, 31 Kas. 423.

Agent for Collection. — Sneed *v.* Hanly, Hempst. 659; Kimbro *v.* Waller, 21 Ala. 376; Jett *v.* Hempstead, 25 Ark. 462; Central Co. *v.* First Bank, 73 Ga. 383; Hayward *v.* Gunn, 82 Ill. 385; Cagwin *v.* Ball, 2 Ill. Ap. 70; Helvey *v.* Board, 6 Blackf. 317; Dodds *v.* Vannoy, 61 Ind. 89; Coffin *v.* Coffin, 7 Greenl. 298; Mast *v.* Easton, 33 Minn. 161; Wentworth *v.* Gove, 45 N. H. 160; Stafford *v.* Richardson, 15 Wend. 302; Finney *v.* Cochran, 1 Watts & S. 112; Krause *v.* Dorrance, 10 Barr, 462; Wickersham *v.* Lee, 83 Pa. 416; Estes *v.* Stokes, 2 Rich. 133; Cocke *v.* McGinnis, Mart. & Y. 361; Lawrence Univ. *v.* Smith, 32 Wis. 587.

Pledgee or Mortgagee for surplus proceeds of a sale. — Overstreet *v.* Nunn, 36 Ala. 666; Webster *v.* Singley, 53 Ala. 208; Ballinger *v.* Bourland, 87 Ill. 513; Brunson *v.* Ballou, 70 Iowa, 34; Hertle *v.* Schwartze, 3 Md. 366; Arms *v.* Ashley, 4 Pick. 71; Varnum *v.* Meserve, 8 All. 158; Estabrook *v.* Earle, 97 Mass. 302; Hancock *v.* Franklin Co., 114 Mass. 155; Cook *v.* Basley, 123 Mass. 396; Cope *v.* Wheeler, 41 N. Y. 303.

Trustee of Insurance Policy for proceeds of policy. — Sidaways *v.* Todd, 2 Stark. 400 (see London Co. *v.* Glyn, 1 E. & E. 652); Gould *v.* Emerson, 99 Mass. 154; De-

GILES and Another v. PERKINS and Others, Assignees of DICKENSON and Others, Bankrupts.

In the King's Bench, November 7, 1807.

[*Reported in* 9 *East*, 12.]

Dickenson & Co. were bankers at Birmingham, with whom the plaintiffs had opened a banking account in 1804, which was continued down to the 18th of November, 1805, when Dickenson & Co. stopped payment and became bankrupts. On the 12th of November, 1805, the plaintiffs paid into the bank three bills to the amount of above £1100, which were indorsed by them, but were not due till December and January following; and at the time of the bankruptcy there was a considerable balance due to the plaintiffs upon their cash and bills (due) account, independent of the three bills in question. It was stated to be the practice of this and other banking-houses in the country, that when bills which were approved were brought to them by a customer, though the bills were not then due, if they had not a long time to run, they would enter them in a gross sum with cash, or paper which was immediately payable, to the credit of the customer; giving him either cash or liberty to draw upon them to that amount. And the bankers so far considered these running bills (which were always indorsed by the customer) as their own, that they would, as convenience required, pay them away to other customers in the usual course of business, or transmit them to their own correspondents in London: and interest was charged on both sides the account on such paper transactions; and if the interest account turned out to be against the customer, the bankers also charged a certain commission. Differing in this respect from the practice of bankers in London, who, upon the receipt of undue bills from a customer, do not carry the amount directly to his credit, but enter them short, as it is called; that is, note down the receipt of the bills in his account, with the amount, and the times when due, in a

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rome v. Vose, 140 Mass. 575; Kimball v. Gilman, 60 N. H. 54; Roberts v. Ely, 113 N. Y. 128.

Guardian. — Pickering v. De Rochemont, 45 N. H. 67.

In Thomas v. Thomas (1850), 5 Ex. 28, a tenant in common failed in an action of *Indebitatus assumpsit* against his cotenant, who had received more than his share of the profits. This case has been thought to be at variance with Lord Mansfield's decision in Dale v. Sollet. 2 Harvard Law Review, 256. But, although Parke, B., in the opinion of the court, makes the old and really fundamental distinction between Account and Debt, this distinction was not material to the decision. No action whatever lay at common law by one cotenant against his fellow, unless the latter had become by agreement the bailiff of the former. The statute 4 Anne, c. 16, § 27, gave the remedy of Account against the cotenant as bailiff, though not in fact a bailiff. But the statutory remedy did not extend beyond account. *Indebitatus assumpsit* was, accordingly, inadmissible.

But an assignee under a general assignment for the benefit of creditors is not chargeable by a creditor in *Indebitatus assumpsit.* Massachusetts Bank v. Bullock, 120 Mass. 86; Dias v. Brunell, 24 Wend. 9; Mansfield v. Manuf. Co., 52 Vt. 444. — Ed.

previous column of the same page; which sums when received are carried forwards into the usual cash column. In the present case the assignees of the bankrupts, considering that the three bills in question had been entered in the bank books in common with cash, and that by the usual mode of dealing the plaintiffs might have drawn for the amount before the bills were due, refused to deliver them up to the plaintiffs on demand; and as they became due the assignees received the money from the acceptors, to the credit of the bankrupts' estate: for which the plaintiffs brought their action for money had and received. And the question was, whether they were entitled to receive back these bills in specie from the bankrupts at the time of their bankruptcy, the same not being then due, though indorsed by them, and the balance of the cash account being in favor of the plaintiffs; or whether they were only entitled to come in as creditors under the commission for the whole amount of their banking account. LORD ELLENBOROUGH, C. J., was of opinion, at the trial before him at Guildhall, that the plaintiffs were entitled to recover; and they accordingly obtained a verdict for the amount of the bills.

Garrow and *Richardson* now moved for a new trial; relying on the course of dealing of country bankers who always entered approved bills at the usual short dates, as cash, and gave the customers the benefit of drawing upon them for the amount accordingly. And he referred to Bent *v.* Puller, where there having been a general bill account between two parties, one of whom became bankrupt, it was considered that the solvent party, in whose favor the balance was, could not maintain trover for the bills deposited by him with the other; they having been paid in on a general account, and not specifically appropriated to answer particular drafts which had not been paid by the bankrupt.

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LORD ELLENBOROUGH, C. J. Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance.[1] ✓ The only difference between the practice stated of London and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; whereas the country banker, who always takes the bill indorsed, has not only a lien upon it, if his account be overdrawn, but has also his legal remedy upon the bill by the indorsement; but neither of them can have any lien on such bills until their account be overdrawn: and here the balance of the cash account at the time of the bankruptcy was in favor of the plaintiffs.

Trustee

pure

PER CURIAM. *Rule refused.*[2]

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[1] *Ex parte* Thompson, Mont. & M. 102 *Accord.* — ED.

[2] Zinck *v.* Walker, 2 Blackst. 1154; *Ex parte* Madison, 1 Rose, 241 (cited); Parke *v.* Eliason, 1 East, 544; *Ex parte* Rowton, 17 Ves. 426, 1 Rose, 15, s. c.; *Ex parte* Sol-

lers, 18 Ves. 229; *Ex parte* Sergeant, 1 Rose, 153; *Ex parte* Pease, 19 Ves. 25, 1 Rose, 232, s. c.; *Ex parte* Wakefield Bank, 1 Rose, 243; *Ex parte* Leeds Bank, 1 Rose, 254; *Ex parte* Buchanan, 1 Rose, 280; Thompson *v.* Giles, 2 B. & C. 422; *Ex parte* Armitstead, 2 Gl. & J. 371; *Ex parte* Benson, Mont. & Bl. 120; Jombart *v.* Woollett, 2 M. & Cr. 389; *Ex parte* Bond, 1 M. D. & D. 10; *Ex parte* Edwards, 11 L. J. Bank. 36; *Ex parte* Barkworth, 1 DeG. & J. 140; Scott *v.* Ocean Bank, 23 N. Y. 289; Second Bank *v.* Cummings (Tenn.), 18 S. W. R. 115 *Accord.*

Although the plaintiff was allowed to succeed in the common law action of trover, it seems clear that in this class of cases, as in those where a defrauded vendor resorts to the same remedy against the fraudulent vendee, the court of law have, perhaps unconsciously, admitted trover as a substitute for a bill in equity. In *Ex parte* Dumas, 2 Ves. 583, Lord Hardwicke, in 1754, said: "It must be a very extensive question, whether the property of these bills in point of law remained in the petitioners, so that they might maintain Trover at law. They were all made payable to Julians or order; and then he doubted no action of Trover could be maintained; for the property of the paper will follow the *chose* in action; but it would be sufficient if they could be made trustees for the petitioners." So to the same effect, Collins *v.* Martin, 1 B. & P. 648, 651, per Eyre, C. B. Lord Eldon reluctantly recognized the innovation in *Ex parte* Pease, 19 Ves. 46: "I do not consider whether these bills might be recovered in an action. If the doctrine of those cases is right, in which the court has struggled upon equitable principles to support an action of trover, these bills might be recovered at law; but there is no doubt that they might be recovered by a bill in equity."

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If matured or demand paper is indorsed "for collection" or "for deposit," and deposited in a bank, the bank is presumptively not a debtor until the paper is paid. Commercial Bank *v.* Armstrong, 39 Fed. Rep. 684; Fifth Bank *v.* Armstrong, 40 Fed. Rep. 46; First Bank *v.* Armstrong, 42 Fed. Rep. 193; Nat. Bank *v.* Hubbell, 117 N. Y. 384; La. Co. *v.* State Bank, 1 McGloin, 181.

The rule should be the same where the paper is indorsed "for collection and credit." But see, *contra*, First Bank *v.* Armstrong, 39 Fed. Rep. 231; Ayres *v.* Farmers' Bank, 79 Mo. 421; Bullene *v.* Coates, 79 Mo. 426.

The same presumption seems just when the paper is simply indorsed in blank by the depositor. *Re* Agra Bank, 36 L. J. Ch. 151 (*semble*); St. Louis Co. *v.* Johnston, 133 U. S. 566 (reversing s. c., 27 Fed. Rep. 243); Balbach *v.* Frelinghuysen, 15 Fed. Rep. 675 (approved in Hoffman *v.* First Bank, 46 N. J. 604; but see Terhune *v.* Bergen Bank, 34 N. J. Eq. 367; Titus *v.* Mechanics' Bank, 35 N. J. 588.)

But see, *contra*, Somerville *v.* Beal, 49 Fed. Rep. 790 (*semble*); Metropolitan Bank *v.* Loyd, 90 N. Y. 530 (adopted in Brooks *v.* Bigelow, 142 Mass. 6, as controlling evidence of New York law).

In Moors *v.* Goddard, 147 Mass. 287, it was decided that the bank was not a debtor because the customer was allowed to draw against the deposit only as a matter of courtesy; but it was said that, if the customer were entitled to draw as a matter of right, the transaction would import a discount. It should be observed in regard to Metropolitan Bank *v.* Loyd, *supra*, that the controversy arose between the depositor and a creditor of the bank to whom the latter had forwarded the paper on account of its debt; the case may be thought, therefore, to show the disposition of the New York courts to strain the facts in order to avoid the application of their unfortunate doctrine that a creditor taking a bill on account of his claim does not rank as a purchaser for value.

From the moment of collection, however, whether the paper is indorsed in blank, or "for collection," or "for collection and credit," the bank is presumptively a debtor, being entitled and accustomed to treat the proceeds of the paper as its own. *Re* Hallett's Estate, 13 Ch. Div. 723, 724, per Thesiger, L. J.; Crowther *v.* Elgood, 34 Ch. Div. 694, per Cotton, L. J.; (but see *Re* West of England Bank, 11 Ch. D. 772;) Marine Bank *v.* Fulton, 2 Wall. 252; Planters' Bank *v.* Union Bank, 16 Wall. 483, 501; Phœnix Bank *v.* Risley, 111 U. S. 125; Balbach *v.* Frelinghuysen, 15 Fed. Rep. 675, 682, 683 (*semble*); Nat. Bank *v.* Miller, 77 Ala. 168; Marine Bank *v.* Chandler, 27 Ill. 525; Marine Bank *v.* Rushmore, 28 Ill. 463; Tinkham *v.* Heyworth, 31 Ill. 519; Clark *v.* Merchants' Bank, 2 N. Y. 380; People *v.* Merchants' Bank, 78 N. Y. 269; Briggs *v.*

CARSTAIRS AND OTHERS, ASSIGNEES OF KENSINGTON & CO., BANKRUPTS, *v.* BATES.

AT NISI PRIUS, BEFORE LORD ELLENBOROUGH, C. J DECEMBER 18, 1812.

[*Reported in* 3 *Campbell*, 301.]

THIS was an action against the defendant, as acceptor of a bill of exchange for £230, dated 13 July, 1812, drawn by J. Allport, payable to his own order, at two months after date, and indorsed by him to the bankrupts.

Allport, the drawer, kept cash with Kensington & Co., the bankers. On the 17th of July they discounted for him this bill and two others, — one for £50 and another for £80. They credited him with the amount of the three bills, and debited him with the discount; so that, deducting the discount, they were placed to his account as cash, which he might immediately have drawn out. There was then a balance due to him of three or four hundred pounds, and his account remained *good* till the banking-house stopped payment. This happened on the 21st of July, and the commission of bankrupt was sued out the following day.

Park, for the defendant, insisted that the action could not be maintained, as the bill of exchange under these circumstances remained the property of Allport; and he relied upon Giles *v.* Perkins, in which it was held that a customer paying bills not due into his bankers in

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Central Bank, 89 N. Y. 182; People *v.* City Bank, 93 N. Y. 582; Nat. Bank *v* Hubbell, 117 N. Y. 384; Jockusch *v.* Towsey, 51 Tex. 129.

But see, *contra*, *Re* Brown, 6 Morrell, 81; First Bank *v.* Armstrong, 36 Fed. Rep. 59; Nurse *v.* Satterlee, 81 Iowa, 491; Thompson *v.* Gloucester Bank, 8 Atl. R. 97, N. J. Eq. (1887); Arnot *v.* Bingham, 55 Hun, 553.

Where paper is sent to a distant bank for collection and remittance, the bank, according to the following cases, does not become a debtor upon collection, but is to be treated as a trustee until remittance is actually made either in specie or by an approved draft. Philadelphia Bank *v.* Dowd, 38 Fed. Rep. 172 (*semble*); Harrison Works *v.* Coquillard, 26 Ill. Ap. 513; People *v.* Dansville Bank, 39 Hun, 187; Bank *v.* Weems, 69 Tex. 489.

A bank collecting the paper after its known insolvency has, of course, no right to use the proceeds as its own, but must hold them as trustee. German Bank *v.* Third Bank (U. S. C. C. 1878), 18 Alb. L. J. 252; Franklin Bank *v.* Beal, 49 Fed. Rep. 606, 607 (*semble*); Somerville *v.* Beal, 49 Fed. Rep. 790; Manufacturers' Bank *v.* Continental Bank, 148 Mass. 553; Jockusch *v.* Towsey, 51 Tex. 129.

If the trustee for collection sees fit, without authority, to take anything else than money in payment, and surrenders the paper, the depositor should have the right to treat the transaction as a collection and so to charge the bank as a debtor. Franklin Bank *v.* Beal, 49 Fed. Rep. 606; Harrington *v.* Merchants' Bank, 17 Phila. 38. See, *contra*, Russell *v.* Hankey, 6 T. R. 12 (followed in Ridley *v.* Blackett, Peake, N. C. 62, but questioned in Grant, Banking, 4th ed. 80); Levi *v.* Nat. Bank, 5 Dill. 104; Steinharte *v.* Nat. Bank (Cal. 1892), 29 Pac. R. 717. — ED.

the country, who credited their customers for the amount of such bills if approved as cash (charging interest), was entitled to recover back such bills in specie upon the bankers becoming bankrupt, the balance of his cash account, independent of such bills, being in his favor at the time of the bankruptcy. There Lord Ellenborough said, "Every man who pays bills not then due into the hands of his banker places them there as in the hands of his agent, to obtain payment of them when due."

LORD ELLENBOROUGH. Is it meant seriously to contest the right of the assignees to recover in this action? The bankers were the purchasers of this bill. They did not receive it as the agents of Allport. The whole property and interest in the bill vested in themselves, and they stood all risks from the moment of the discount. If the bill had been afterwards stolen or burned, theirs would have been the loss. In Giles *v.* Perkins the bankers were mere depositaries, with a lien when the account was overdrawn. The customer there drew upon the credit of the bills deposited. Here Allport might have drawn out the amount of the bill, deducting the discount, as actual cash, in the same manner as if he had discounted the bill with a third person, and then paid in the amount in bank notes. The discount makes the bankers complete purchasers of the bill; the transaction was completed; they had no lien, but the thing itself; the bill was as much theirs as any chattel they possessed. This very distinction was taken in the case cited; for it was there said, "If the banker discount the bill, or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance." *Verdict for the plaintiff.*[1]

WILLIAM MACKERSY, APPELLANT, *v.* RAMSAYS, BONARS, & CO., RESPONDENTS.

IN THE HOUSE OF LORDS, MARCH 2, 9, 1843.

[*Reported in* 9 *Clark & Finnelly,* 818.]

LORD CAMPBELL.[2] I am of opinion that the interlocutor of the Lord Ordinary was right, and that the judgment of the Court of Session which reversed it cannot be supported. It appears that Ramsay & Co., of Edinburgh, in the way of their business as bankers, were employed for reward by a customer, with whom they had a cash account, to obtain payment of a bill of exchange drawn on a person in Calcutta, payable to their order. They did not become the owners of the bill, or discount it, but they were to receive payment of it ~~from~~ for

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[1] In *Re* Madison Bank, 5 Biss. 515, the transaction was treated as a discount, but on very slender evidence. — ED.

[2] The concurring opinion of Lord Cottenham and the arguments of counsel are omitted. — ED.

Mackersy, having a lien on the bill and its proceeds for any balance due to them from him. The payment was to be made to persons to be employed by them, to whom the bill must be indorsed. Mackersy was not to interfere with the proceeds of the bill till he was credited, or entitled to be credited, by them for its amount. They employed as their agents Coutts & Co., of London, who employed Alexander & Co., of Calcutta, who duly received payment from the acceptor, and, having given Coutts & Co. credit in account, five months afterwards became bankrupt. I conceive that these circumstances amount, in point of law, to a payment to Ramsay & Co., and that they were bound to place the amount to the credit of Mackersy.

The general rule of law, that an agent is liable for a sub-agent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a sub-agent; and here I conceive that the money is to be considered as received by Coutts & Co., whose correspondents actually received it at Calcutta, and credited them with the amount five months before their failure. Mackersy could not have interfered with the money either in the hands of Alexander & Co. or of Coutts & Co. There was no privity between him and either of those houses; but payment to Alexander & Co. was payment to Coutts & Co., and payment to Coutts & Co. was payment to Ramsay & Co., the respondents. I approve of the expression of the Lord Ordinary, when speaking of the receipt of the money by Coutts's correspondents at Calcutta, that "at that moment the law placed it to the credit of the defender."

The judges of the first division truly say that Ramsay & Co. had not become the owners of the bill. If by *vis major*, or *casus fortuitus*, the bill had been destroyed before it reached Calcutta, or if Clelland, the drawer, had become insolvent before it was paid, the loss would not have been theirs. But they might, nevertheless, be agents to receive payment, and be liable for the amount when payment had been actually received.

We have been much pressed with the case of Campbell *v.* The Bank of Scotland, decided by Lord Moncrieff, a judge for whose opinion I should entertain as much deference as for the opinion of any judge in Scotland or England; but the facts of the case are not distinctly stated, so that we do not accurately know on what circumstances that judgment proceeded. If he had decided that in a case like this the bankers were not liable for the money received by their correspondents, I should have been bound to say, with all respect, that he had come to an erroneous conclusion.

I therefore move your Lordships that the interlocutors of the first division of the Court of Session complained of be reversed, and that the interlocutor of the Lord Ordinary assoilzieing the defender with costs, be affirmed.[1]

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[1] Prince *v.* Oriental Bank, 3 App. Cas. 325, 335 (*semble*); Taber *v.* Perrot, 2 Gall. 565; Kent *v.* Dawson Bank, 13 Blatchf. 237; Nat. Bank *v.* Beal, 50 Fed. Rep. 355

COMMERCIAL NATIONAL BANK *v.* HAMILTON NATIONAL BANK.

IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF INDIANA, JULY 15, 1890.

[*Reported in* 42 *Federal Reporter*, 880.]

AT LAW.

Lawrence Maxwell and *Morris & Barrett*, for plaintiff.

Bell & Morris, for defendant.

GRESHAM, J. In April, 1884, the plaintiff sent to Fletcher & Sharp, bankers at Indianapolis, a draft indorsed: "Pay to the order of Fenton, for collection, on account of Commercial Bank." Fenton was Fletcher & Sharp's cashier, and the draft was sent to them in pursuance of an arrangement entered into in 1883, whereby Fletcher & Sharp were to make collections for the plaintiff, and remit balances on the 1st and 15th of each month. Fletcher & Sharp indorsed the draft: "Pay to the order of John Mohr, Jr., cashier, or order, for collection,

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(*semble*); Guelich *v.* Nat. Bank, 56 Iowa, 434, 437; Simpson *v.* Waldby, 63 Mich. 439; Power *v.* First Bank, 6 Mont. 251; Commercial Bank *v.* Union Bank, 11 N. Y. 203; Briggs *v.* Central Bank, 89 N. Y. 182; St. Nicholas Bank *v.* State Bank, 128 N. Y. 26; Reeves *v.* Bank, 8 Oh. St. 465; Young *v.* Noble, 2 Disney, 485; Bradstreet *v.* Everson, 72 Pa. 124; Merchants' Bank *v.* Goodman, 109 Pa. 422, 17 Phila. 38, s. c.: Fifth Bank *v.* Ashwater, 123 Pa. 212 *Accord.*

Daly *v.* Butchers' Bank, 56 Mo. 94; First Bank *v.* Sprague (Neb. 1892), 51 N. W. R. 846 *Contra.* 15 N. C. 534.

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18 Tex. Civ.

The decisions are hopelessly irreconcilable on the point whether a bank employed as an agent for collection is liable to the principal for a loss resulting from the laches of a sub-agent. The agent is liable, according to the following authorities, when the sub-agent is a bank: Van Wart *v.* Woolley, 3 B. & C. 439; Exchange Bank *v.* Third Bank, 112 U. S. 276; Tyson *v.* State Bank, 6 Blackf. 225 (sub-agent was a branch of agent bank); American Co. *v.* Haire, 21 Ind. 4 (*semble*); Montgomery Bank *v.* Albany Bank, 7 N. Y. 459; C. E. Bank *v.* F. N. Bank, 118 N. Y. 443, 447; and in Allen *v.* Merchants' Bank, 22 Wend. 215, and Ayrault *v.* Pacific Bank, 47 N. Y. 570, where the sub-agent was a notary.

The contrary rule is maintained in the following cases of sub-agent banks: East Haddam Bank *v.* Scovil, 12 Conn. 303; Ætna Co. *v.* Alton Bank, 25 Ill. 243; Guelich *v.* Nat. Bank, 56 Iowa, 434; Lindsborg Bank *v.* Ober, 31 Kas. 599; Jackson *v.* Union Bank, 6 Har. & J. 146; Fabens *v.* Mercantile Bank, 23 Pick. 330; Dorchester Bank *v.* N. E. Bank, 1 Cush. 177; Third Bank *v.* Vicksburg, 61 Miss. 112; Daly *v.* Butchers' Bank, 56 Mo. 94 (*semble*); Mechanics' Bank *v.* Earp, 4 Rawle, 384; Morgan *v.* Tener, 83 Pa. 305, 307 (*semble*); Louisville Bank *v.* First Bank, 8 Baxt. 101; Second Bank *v.* Cummings (Tenn. 1892), 18 S. W. R. 115; Stacy *v.* Dane Bank, 12 Wis. 629. And in the following cases where the sub-agent was a notary: Britton *v.* Niccolls, 104 U. S. 757; May *v.* Jones (Ga. 1891), 14 S. E. R. 552; Hyde *v.* Planters' Bank, 17 La. 560; Baldwin *v.* La. Bank, 1 La. An. 13; Frazier *v.* N. O. Co., 2 Rob. (La.) 294; Citizens' Bank *v.* Howell, 8 Md. 530; Warren Bank *v.* Suffolk Bank, 10 Cush. 582; Tiernan *v.* Comm. Bank, 8 Miss. 648; Agricultural Bank *v.* Comm. Bank, 15 Miss. 592; Bowling *v.* Arthur, 34 Miss. 41; Bank *v.* Butler, 41 Oh. St. 519; Bellemire *v.* U. S. Bank, 4 Whart. 105. — ED.

for account of Fletcher & Sharp." — and sent it to the defendant, whose cashier John Mohr was, at Fort Wayne. The defendant collected the draft on July 10, 1884, and the same day credited Fletcher & Sharp with the proceeds, $3,197.49, and advised them of the fact. On receipt of this advice, July 11th, Fletcher & Sharp charged the defendant, and credited the plaintiff, with the amount, and notified the latter. This notice was received by the plaintiff, July 12th, when it charged Fletcher & Sharp. On July 15th the defendant posted a letter at Fort Wayne, addressed to Winslow, Lanier, & Co., bankers at New York, directing them to credit Fletcher & Sharp with the amount collected. At this time, and for several years previous, the defendant and Fletcher & Sharp had made collections for each other under an arrangement whereby any amount due from one to the other was placed to the latter's credit with Winslow, Lanier, & Co., with which banking firm both kept accounts; but the plaintiff had no knowledge of this arrangement. The defendant in good faith directed that the credit be given to Fletcher & Sharp in New York, not knowing that they were indebted to Winslow, Lanier, & Co. Fletcher & Sharp failed, and ceased to do business, on July 14th, which failure was announced in the evening papers of Fort Wayne the next day, after banking hours, not, however, until after the defendant had posted the letter of instruction to Winslow, Lanier, & Co. This letter was received in New York on July 17th. The defendant knew of the failure of Fletcher & Sharp on July 16th; and, although it had ample time to have done so, it failed to countermand the order sent by mail to the New York banking firm. On July 25th the plaintiff addressed a letter to the defendant, claiming the collection, and demanding that it be remitted. The demand was refused, and this suit was brought to recover the amount.

The indorsement to Fletcher & Sharp "for collection" authorized them and their indorsee to collect the draft for the owner, the plaintiff. Fletcher & Sharp received the draft for collection, and for no other purpose, and the restrictive character of the indorsement informed the defendant that the title remained in the plaintiff, and that it would own the proceeds when collected. The defendant became a mere sub-agent of the plaintiff for collection, with no more right to pay the proceeds to Winslow, Lanier, & Co. than Fletcher & Sharp would have had if they had made the collection. Fletcher & Sharp acquired no property in the draft, and they passed none to the defendant. The defendant, as sub-agent or trustee of the plaintiff, was bound to send the proceeds to it directly, or through Fletcher & Sharp.[1] It did neither. The defendant claims that the placing of the amount of the collection to the credit of Fletcher & Sharp on the books of Winslow, Lanier, & Co., the charging of the same amount against the defendant by Fletcher & Sharp, the crediting by them of the plaintiff with a like amount, and the charging of Fletcher & Sharp by the plaintiff, amounted to a payment by the defendant to the plaintiff, through Fletcher & Sharp; that the defendant should not be required to pay the money again; and that the draft and its proceeds were, in all respects, treated in accordance with long and well established custom and usage among banks and bankers. The plaintiff's indorsement upon the draft was plain, and its legal force cannot be defeated by resort to usage or custom, or by any method of book keeping.[1] In discussing the effect of indorsements of this character, the Supreme Court, in White *v.* Bank, 102 U. S. 658, said: —

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[1] See criticism of this statement in 4 Bank. L. J. 3. — Ed.

"The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof, or by resort to usage. The plain meaning of it is that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper, or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. . . . If this be a sound view of the legal effect of the written indorsement, neither parol proof nor custom can be received to contradict it."

Instead of sending the money directly to the plaintiff, or through Fletcher & Sharp, the defendant sent it to Winslow, Lanier, & Co., in New York, not for the plaintiff, but to the credit of Fletcher & Sharp. It was a violation of the plain terms of the plaintiff's indorsement to thus treat the draft and its proceeds as the property of Fletcher & Sharp. The defendant sent no money to New York to be credited to Fletcher & Sharp. It simply instructed Winslow, Lanier, & Co., by letter, to charge it, and credit Fletcher & Sharp with an amount equal to the collection; and if the letter of instruction left Fort Wayne before the defendant knew of the failure of Fletcher & Sharp, the defendant knew of the failure in ample time to have sent a despatch countermanding the instruction.

Finding and judgment for the plaintiff for the amount collected with interest.[2]

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[1] Sweeny *v.* Easter, 1 Wall. 173; Bank of the Metropolis *v.* First Nat. Bank of Jersey City, 19 Fed. Rep. 303; Bank *v.* Armstrong, 39 Fed. Rep. 684; First Nat. Bank *v.* Reno Co. Bank, 3 Fed. Rep. 257; Blaine *v.* Bourne, 11 R. I. 119; Bank *v.* Hubbell, 22 N. E. Rep. 1031; Parsons, Notes & Bills, § 143.

[2] If the owner of a bill deposits it with an agent, i. e. a trustee, for collection, indicating by the words "for collection" or otherwise his interest in the bill, and the agent, in due course, transfers the bill to a sub-agent for collection, and *before* collection the agent becomes bankrupt, the owner of the bill is entitled to reclaim the bill or its proceeds from the sub-agent, without regard to the state of the accounts between the agent and sub-agent. Sweeny *v.* Easter, 1 Wall. 166; First Bank *v.* Reno Bank, 3 Fed. Rep. 257; Metropolis Bank *v.* First Bank, 19 Fed. Rep. 301; First Bank *v.* Armstrong, 39 Fed. Rep. 231; Fifth Bank *v.* Armstrong, 40 Fed. Rep. 46; First Bank *v.* Armstrong, 42 Fed. Rep. 193; Peck *v.* First Bank, 43 Fed. Rep. 357; Central Co. *v.* First Bank, 73 Ga. 383; First Bank *v.* First Bank, 76 Ind. 561; Union Bank *v.* Johnson, 9 Gill & J. 297; Cecil Bank *v.* Farmers' Bank, 22 Md. 148; Manufacturers' Bank *v.* Continental Bank, 148 Mass. 553; Freeman's Bank *v.* National Co., 151 Mass. 413; Warner *v.* Lee, 6 N. Y. 144; Nason *v.* First Bank, 116 N. Y. 492; Producers'

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Bank *v.* Ricketts, 1 W. N. (Pa.) 48; Blaine *v.* Bourne, 11 R. I. 119; Sherman Bank *v.* Weiss, 67 Tex. 331.

See also, to the same effect, Kaltenbach *v.* Lewis, 10 App. Cas. 617. (A sub-factor received proceeds of goods after the bankruptcy of factor and knowledge thereof, and with notice of the principal's claim.)

In accordance with the decision in the principal case, that the owner's rights are the same although the agent becomes bankrupt *after* collection, see Levi *v.* Nat. Bank, 5 Dill. 104; *Re* Armstrong, 33 Fed. Rep. 405; First Bank *v.* Bank, 33 Fed. Rep. 408; Commercial Bank *v.* Armstrong, 39 Fed. Rep. 684; Nat. Bank *v.* Beal, 50 Fed. Rep. 355; Armstrong *v.* Nat. Bank (Ky. 1890), 14 S. W. R. 411. In Freeman *v.* Exchange Bank, 87 Ga. 45, a creditor of the depositor was allowed to garnishee the sub-agent after collection, but before remittance to the agent. Compare Fourth Bank *v.* Mayer (Ga. 1892), 6 Bank. L. J. 479; Naser *v.* First Bank, 116 N. Y. 492.

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On the other hand, the original owner did not prevail against the creditors of the bankrupt agent in Hyde *v.* First Bank, 7 Biss. 156. ~~See Freeman's Bank *v.* Nat. Co., 151 Mass. 413, 418.~~

If the agent, as a *del credere* factor, holds the claim against the sub-agent as a trustee for the depositor, the sub-agent is obviously not entitled to make use of any claim against the agent by way of set-off, to the prejudice of the depositor.

If the owner of a bill deposits it with an agent, i. e. a trustee, for collection, but without indicating the trust on the bill, and the agent in the natural course of business transfers the bill to a sub-agent for collection, to be held and credited on the account between the agent and sub-agent, and then the agent becomes bankrupt, being indebted to the sub-agent, the principal cannot reclaim the bill or its proceeds from the sub-agent, in jurisdictions where a transferee on account of an antecedent debt is treated as a purchaser for value without notice. Johnson *v.* Robarts, 10 Ch. 505; Bank of Metrop. *v.* N. E. Bank, 1 How. 234, 6 How. 212, s. c.; (but see Wilson *v.* Smith, 3 How. 763;) Vickrey *v.* State Association, 21 Fed. Rep. 773; Wyman *v.* Colo. Bank, 5 Col. 30; Coors *v.* German Bank, 14 Col. 202; Rathbone *v.* Sanders, 9 Ind. 217; Wood *v.* Boylston Bank, 129 Mass. 358; Cody *v.* City Bank, 55 Mich. 379; Edson *v.* Angell, 58 Mich. 336; Hoffman *v.* First Bank, 46 N. J. 604; Carroll *v.* Bank, 30 W. Va. 518. (But see, *contra*, Lawrence *v.* Stonington Bank, 6 Conn. 521; Miller *v.* Farmers' Bank, 30 Md. 392; First Bank *v.* Strauss, 66 Miss. 479; Millikin *v.* Shapleigh, 36 Mo. 596; Bury *v.* Woods, 17 Mo. Ap. 245.) For the same reason, where goods are consigned to a factor for sale, and by the factor, in due course, to a sub-factor, who sells and receives the proceeds before the factor's bankruptcy, and in ignorance of the original consignor's interest in the goods, the sub-factor is entitled to apply the proceeds in satisfaction of any claim he may have against the factor. New Zealand Co. *v.* Watson, 7 Q. B. Div. 374.

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In jurisdictions where one who takes negotiable paper on account of an antecedent debt is not treated as a purchaser for value, the principal is, of course, entitled to recover the bill, if it is still uncollected and in the hands of the sub-agent. Van Amee *v.* Troy Bank, 8 Barb. 312; Scott *v.* Ocean Bank, 23 N. Y. 289; Hoffman *v.* Miller, 9 Bosw. 334; Commercial Bank *v.* Marine Bank, 3 Keyes, 337; Dod *v.* Fourth Bank, 59 Barb. 265; Stark *v.* U. S. Bank, 41 Hun, 506; First Bank *v.* Gregg, 79 Pa. 384; Hackett *v.* Reynolds, 114 Pa. 328. And after collection the principal may enforce the sub-agent's liability as debtor to the agent without any deduction by way of set-off of any debt due from the agent to the sub-agent. McBride *v.* Farmers' Bank, 26 N. Y. 450; Dickerson *v.* Wason, 47 N. Y. 439; West *v.* American Bank, 44 Barb. 175; Lindauer *v.* Fourth Bank, 55 Barb. 75; Jones *v.* Milliken, 41 Pa. 252. — ED.

Ex Parte BROAD. In Re NECK.

In the Court of Appeal, July 18, 1884.

[*Reported in 13 Queen's Bench Division,* 740.]

This was an appeal from an order made by Mr. Registrar Hazlitt, on the 24th of April, 1884, directing the trustee in the liquidation of J. F. Neck to pay J. Thomsen, of Bergen, in Sweden, out of the assets of the debtor, the sum of £450, being the amount of a draft drawn by Thomsen on Westenholz Brothers of London, dated the 13th of July, 1883, payable at sight, and which was remitted by Thomsen to Neck for the purpose of taking up a bill of exchange drawn by Thomsen on Neck, dated the 19th of April, 1883, and accepted by Neck.

Neck had carried on the business of a foreign banker and merchant in the city of London. Thomsen carried on business at Bergen, in Sweden, as a merchant, under the firm of Gottlieb Thomsen. For some years Neck had been in the habit of accepting for the accommodation of Thomsen bills drawn on him by Thomsen. The course of business was thus described in an affidavit made by Thomsen: "For some years past I have been accustomed from time to time to draw bills upon Neck at three months date, which he has accepted, and before the due dates of such bills it has been my invariable custom to remit funds to Neck to cover my drafts as they respectively matured." Thomsen further said: "On the 19th of April, 1883, I drew a bill for £450 on Neck, payable to the order of Bergen's Private Bank, at three months date, which bill was accepted by Neck, and was made payable at his bankers' in the city of London. The said bill matured on the 21st of July, 1883 (the 22d of that month falling on a Sunday). On the 13th of July, 1883, I remitted to Neck a draft for £450, upon Westenholz Brothers of London, at sight, which I am informed and believe was received by Neck on the 17th of July, 1883. I am also informed and believe that the draft upon Westenholz Brothers was accepted by that firm, and was paid by Neck to his account with his bankers on the day it was received, and that it was duly collected."

On the 20th of July, 1883, Neck stopped payment, and, when the bill for £450 which he had accepted was presented the next day to his bankers for payment, payment was refused.

Neck made an affidavit in which he said: "Thomsen was well aware from time to time, when he remitted to me bills to meet my acceptances on his account and for his accommodation, that I was in the habit of discounting such bills remitted by him, although, as a matter of fact, I sometimes did not discount such bills forthwith, but retained the same until it was convenient to me to discount them. In any event it was the arrangement between us that I should debit him with interest at the rate of five per cent per annum in respect of moneys paid by me for the purpose of paying my credit acceptances as aforesaid, and credit him with interest at the same rate, from the due dates of any remitted bills, in respect of any moneys which were the proceeds of bills remitted by him. It was my custom to render accounts to Thomsen annually, and such accounts were made up to the 31st of December in each year, and the balance of interest was either debited or credited, as the case might be, in the accounts so rendered."

Neck's books showed that the accounts between himself and Thomsen were kept in the manner thus described.

The letter dated the 13th of July, 1883, in which Thomsen sent to Neck the bill for £450 on Westenholz Brothers, contained the following passage: "Enclosed I beg to remit £450 at sight on Westenholz Brothers, which please encash to my credit." In a letter dated the 18th of July, 1883, written by Neck to Thomsen, he said: "We are in receipt of your favor of the 13th inst. handing a check for £450 for 17th inst. on Westenholz Brothers, which is noted to the credit of your account." In the book of "bills receivable" kept by Neck, the bill on Westenholz Brothers was entered as received on Thomsen's account. On the 14th of November, 1883, Neck filed a liquidation petition, under which his creditors resolved on a liquidation by arrangement, and appointed a trustee.

The trustee appealed from the Registrar's order.

Sidney Woolf, for the appellant.

J. E. Linklater, for Thomsen.[1]

Cotton, L. J. I also am of opinion that the appeal must be allowed. We have to deal with the proceeds of a remittance made by the customer to the debtor which had been cashed before the debtor's stoppage, not with a bill which remained in specie at the time when the stoppage took place. If the bill had remained in specie, the matter would have stood upon a very different footing, and, though it is not necessary to decide the point, probably the customer might then have been entitled to say, "That is my bill; I have paid your acceptance, therefore hand over the bill to me."[2] But what really took place was this. A few days before the stoppage the debtor cashed the bill, and now the customer says, "I am entitled to follow the proceeds, as trust money specifically appropriated to a purpose which has not been performed, and therefore the money ought to be handed over to me." In my opinion he is not so entitled. We find that the course of dealing was this. Although the remittances were made by the customer for the purpose of meeting the debtor's acceptances on his account, yet the debtor cashed or discounted the remittances which were made to him, and carried the proceeds to the general account of the customer, and credited the customer with interest on the sums which he had thus received in respect of the remittances.

Now in *In re* Gothenburg Commercial Co., Sir G. Jessel, M. R., said, "The bills were sent, I think, originally for the purpose generally of providing funds to meet the acceptances, and for no other purpose, with this right of discounting and appropriating the money." If a man pays interest for money, he must be entitled to the use of it. When a man locks up money which is intrusted to him in a box, he does not pay interest on it. I think we must judge of the contract between the parties from the course of dealing and from the accounts which were rendered, and, looking at the whole course of dealing, in my opinion, although, so long as the remittance remained in specie, the customer might have said, "Hand it over to me," yet, looking at the accounts rendered from time to time, the inference is that the banker was to be at liberty to put himself in funds by cashing the remittances, and, when he had done so, to treat himself, not as a trustee of the proceeds for the customer, but only as a debtor to the customer for the sum which he had thus received. In my opinion, interest being from time to time carried to the credit of the customer in the account, the banker was entitled to put the proceeds into his own pocket, not keeping them separate from his general account.

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[1] The arguments of counsel, as well as the concurring opinions of Lindley and Baggallay, L. JJ., are omitted. — Ed.

[2] Hassall *v.* Smithers, 12 Ves. 119; *Ex parte* Gomez, 10 Ch. 639; *Re* Gothenburg Co., 29 W. R. 358; *Ex parte* Dever, 14 Q. B. Div. 611, 622 *Accord.* — Ed.

In my opinion, therefore, as regards the proceeds of this bill which was cashed before the stoppage, the customer must come in and prove as a creditor, and I cannot say that the debtor was a trustee of the money for him. I cannot see any distinction between the present case and *In re* Gothenburg Commercial Co. *Appeal allowed.*[1]

STUMORE v. CAMPBELL & CO.

IN THE COURT OF APPEAL, NOVEMBER 28, 1891.

[*Reported in* (1892) 1 *Queen's Bench*, 314.]

APPEAL from the judgment of A. L. Smith, J., on an interpleader issue.

The plaintiff, as judgment crditor of Colonel Betty, deceased, claimed to attach a sum of money in the hands of the defendants. This sum of money was intrusted by the deceased to the defendants, who were acting as his solicitors, to be handed over to the plaintiff with a bill of exchange which the deceased was to provide, to carry out an arrangement by which the money and bill of exchange were to be taken in satisfaction of the judgment. This arrangement broke down by reason of the death of Colonel Betty before he had provided the bill of exchange, and the money remained in the hands of the defendants. The defendants had a claim for law costs against the estate of the deceased to a large amount, and they advanced this claim as an answer to the plaintiff's application for an order to attach the money in their hands. An issue was accordingly directed to determine whether the defendants were indebted to the estate of the deceased. The learned judge was satisfied that the claim for costs was in excess of the amount

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[1] Bent v. Puller, 5 T. R. 494; Bolton v. Puller, 1 B. & P. 539; *Re* Gothenburg Co., 29 W. R. 358; *Ex parte* Dever, 14 Q. B. Div. 611, 622. — ED.

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of the money deposited, and he held that the defendants would be entitled to counter-claim for these costs in an action by the executors for repayment of the money deposited. He, therefore, decided that they were not indebted to the estate of the deceased, and gave judgment in their favor, and the plaintiff appealed.

W. Phipson, for the plaintiff.

Muir Mackenzie, (with him, *R. T. Reid*, *Q. C.*,) for the defendants.[1]

LORD ESHER, M.R. In this case the question is whether the defendants are indebted to the estate of the deceased. A. L. Smith, J., has decided that they are not, for reasons that I will presently notice; but I find myself unable to agree with the learned judge.

It appears that some money was placed in the hands of the defendants, who are solicitors, for a particular purpose. So long as that purpose existed there was a trust imposed on them, and they were bound, if they accepted the money at all, to employ it or lay it out in the particular way indicated by the trust. That trust failed, and the result of that failure was that another trust arose immediately to pay back the money to the person who gave it. It is admitted that, being trustees, no lien would attach in their favor, because the money was intrusted to them for a specific purpose. Brandao *v.* Barnett[2] is conclusive on this point. It was also admitted that there would have been no right of set-off in an action before the Judicature Acts to recover this money; — such a plea would have failed, and judgment would have been for the full amount.[3] But it was said that under the Judicature Acts they could have claimed their costs by way of counter-claim, and the learned judge has held that for this reason they were not indebted to the estate of the deceased. The Judicature Acts, as has been often said, did not alter the rights of parties; they only affected procedure, so that no set-off could now be maintained in such a case as this. Before these Acts a person having a cross-claim must have raised it by a cross-action; but these Acts have given a right to counter-claim. In some of the cases language has been used which would seem to imply that a counter-claim is sometimes in the nature of set-off and sometimes not. No doubt matter is occasionally pleaded as counter-claim which is really set-off; but counter-claim is really in the nature of a cross-action. This Court has determined that, where there is a counter-claim, in settling the rights of parties, the claim and counter-claim are, for all purposes except execution, two independent actions.

If the plaintiff sustains his claim, judgment goes for him on that; and if the defendant sustains his counter-claim, judgment goes for him on that. Either claim may be reduced by set-off. But if the plaintiff succeeds in the one case and the defendant in the other, there are two judgments which are independent for all purposes except execution. Wills, J., in Westacott *v.* Bevan,[4] has said that this Court must be taken to have held that these judgments are only separate for the purpose of determining the taxation of costs; but that is a misinterpretation of what this Court has said. Execution, as formerly in cross-actions, is issued for the balance and in favor of the one who has that balance, and this applies to the amounts recovered, and also to the costs. The view this Court has taken is not that which Wills and Vaughan Williams, JJ., attribute to it, though it is very probable that their decision in that case was right. The consequence is that the executors could have obtained a judgment, though the defendants might have had judgment on their counter-claim for a larger amount. There is, therefore, a debt due from the defendants to the estate, and the plaintiff is entitled to attach that debt under a garnishee order. The appeal must, therefore, be allowed. *Appeal allowed.*[1]

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[1] The arguments of counsel and the concurring opinions of Lopes and Kay, L. JJ., are omitted — ED.

[2] 12 Cl. & F. 787.

[4] (1891) 1 Q. B. 774.

[3] But see Gannon *v.* Ruffin, 151 Mass. 204, 206 (*semble*) *Contra.* — ED.

COMMONWEALTH *v.* WILLIAM R. FOSTER.

In the Supreme Judicial Court, Massachusetts, March, 1871.

[*Reported in* 107 *Massachusetts Reports*, 221.]

Indictment for embezzlement, found at July term, 1870, of the Superior Court in Suffolk.

At the trial, before *Wilkinson*, J., John Langley testified that about May 13, 1870, being in need of money, he made two promissory notes payable to his own order and indorsed by himself, payable in four and six months respectively, for $1,250 each, and delivered them to the defendant upon the special agreement of the defendant to sell the notes and deliver the proceeds to Nathan A. Langley, a brother of the witness, charging a commission for his services; that at the same time, and as a part of the transaction, the defendant gave to the witness, as receipts, the defendant's own notes of the same tenor and date as those delivered to him by the witness, which were deposited by the witness with his brother, to be by him given up to the defendant when the latter should deliver the proceeds of the witness's notes

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[1] When money is deposited to be applied in specie for a specific purpose, which cannot be accomplished, the transaction creates a trust and not a debt. The money, therefore, cannot be taken by the creditors of the depositary. Toovey *v.* Milne, 2 B. & Al. 683; Moore *v.* Barthrop, 1 B. & C. 5; Brookville Bank *v.* Deitz, 49 Ind. 598.

The rule is the same where the depositary improperly fails to apply the specific money as directed, e. g. in payment of a claim of the depositary against the depositor. Libby *v.* Hopkins, 104 U. S. 303; Peak *v.* Ellicott, 30 Kas. 156; Ellicott *v.* Barnes, 31 Kas. 170; People *v.* City Bank, 96 N. Y. 32. See also Harrison *v.* Smith, 83 Mo. 210.

Money received by one to invest for another is obviously a trust fund. The remedy of the beneficiary is accordingly in equity; Clapp *v.* Emery, 98 Ill. 523; and not at law, Davis *v.* Coburn, 128 Mass. 377, the Statute of Limitations does not begin to run until the trust is repudiated to the knowledge of the beneficiary; Jones *v.* McDermott, 114 Mass. 400; and the money, though improperly invested by the fiduciary, may be followed by the *cestui que trust* into its product. Day *v.* Roth, 18 N. Y. 448. — Ed.

nts v J. L. [illegible] [illegible]

in pursuance of the agreement before stated; and that he did not know whether the defendant was a broker or not, and did not deal with him as such.

It further appeared that the defendant sold the notes of John Langley to one Wilson for $1,000 in cash, and a mortgage on real estate valued at $1,000; and that he had not delivered any part of the proceeds to John Langley or his brother, but, when asked for them by the former, replied that he had used them and was unable to deliver them. It did not appear that John Langley or his brother had tendered to the defendant the notes given by him.

Upon the close of the evidence for the Commonwealth, the defendant demurred thereto, as insufficient to support a verdict of guilty; but the judge overruled the demurrer. The defendant then testified that he was a real estate broker; and that he negotiated the notes in the manner testified to by John Langley, and used the money, partly in business as a provision dealer, in which he was also engaged at the time, and partly in paying his debts.

The judge thereupon instructed the jury "that it was a question of fact, for them to decide upon the evidence, whether John Langley employed the defendant as a broker; that if the defendant was employed merely to sell the notes, receive the proceeds, and pay over the same specifically to the brother, without any authority to mix them with his own funds, a fraudulent conversion of them would be embezzlement; but that if he was employed as a broker to negotiate the notes in the course of his business, with authority, derived from the nature of that business or otherwise, to mix the proceeds as aforesaid, his use of them would not be embezzlement." The jury returned a verdict of guilty, and the defendant alleged exceptions.

C. R. Train, for the defendant.

C. Allen, Attorney General, for the Commonwealth.

BY THE COURT. Under the instructions given them, the jury must have found that the defendant was an agent within the statute, and embezzled his employer's money. The notes given by him appear to have been given to answer the purpose of receipts, and not for the purpose of transferring to him any property in the notes received by him, or the money received by him on the sale of the notes. Commonwealth *v.* Stearns;[1] Commonwealth *v.* Libbey.[2]

Exceptions overruled.[3]

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[1] 2 Met. 343.

[2] 11 Met. 64.

[3] The defendant being allowed, in the following cases, to use as his own the money received, and becoming thereby a debtor, was not an embezzler: Kribs *v.* People, 82 Ill. 425 (borrower); Mulford *v.* People (Ill. 1891), 28 N. E. R. 1096 (borrower); Comm. *v.* Stearns, 2 Met. 343 (auctioneer or factor); Comm. *v.* Libbey, 11 Met. 64 (general collection agent); Miller *v.* State, 16 Neb. 179 (selling agent, special agreement); Webb *v.* State, 8 Tex. Ap. 310 (selling agent, special agreement).

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In the following cases the defendant, not being allowed to use as his own the money received, was guilty of embezzlement: Wallis *v.* State, 54 Ark. 611 (attorney); Comm. *v.* Tuckerman, 10 Gray, 173 (treasurer of corporation); Comm. *v.* Smith, 129 Mass. 104 (special agent for collection); People *v.* Converse, 74 Mich. 478 (attorney). — ED. 108 Ga 64; 166 Mass 513; 132 Mich 455; 26 Wash. 160;

WALLACE AND SONS, RESPONDENTS, *v.* SAMUEL A. CASTLE AND OTHERS, APPELLANTS.

IN THE SUPREME COURT, GENERAL TERM, NEW YORK, APRIL, 1878.

[*Reported in* 14 *Hun*, 106.]

APPEAL from an order made at the Special Term denying a motion to vacate an order of arrest.

This action was brought to recover certain moneys collected by the defendants on the sale of articles sent by plaintiffs to them for sale on commission.

The defendants claimed that an agreement had been made by which they were not to account for articles sold by them during each month until the twentieth of the succeeding month. An affidavit produced in behalf of the plaintiff stated:

"Deponent further says that on the ninth day of August, 1875, in pursuance of such agreement and understanding, he called on the defendants and requested the defendants to pay him the proceeds of whatever goods they had sold for the plaintiffs up to that time, and on that day they gave deponent a check for $137\frac{63}{100}$, a part of such proceeds, and stated that they had sold goods for and on account of the plaintiff for the value of $666\frac{86}{100}$, which amount had been collected by them.

"The next morning deponent again called and saw the defendant Castle, and said Castle then told deponent that unexpectedly something had happened after deponent saw him on the ninth day of August as aforesaid, and that it had compelled the defendants to suspend payment, and that therefore he could not make any more payments, and could not give deponent a check or pay the money as he had promised to do.

"Deponent then called on the defendant Magrane and told him that the defendant Castle had told deponent that he (Castle) could not pay the money they had collected for the plaintiff, and which they owed plaintiff, on account of the defendants having suspended payment. The defendant Magrane then said to deponent that the plaintiff's account ought to have been paid, and that he would have paid it if he had charge of the finances.

"Deponent further says, that on the twelfth day of August, 1875, the defendants made, and at 3.35 P. M. of that day filed with the clerk of the city and county of New York, an assignment for the benefit of their creditors, and deponent is informed and believes that their property will not pay more than twenty-five cents on the dollar. That an action has been commenced in this court in favor of the plaintiff against the defendants upon the cause of action hereinbefore set forth, to recover the said sum of $666\frac{86}{100}$ with interest from August 10, 1875,

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and the defendants have all appeared therein, but no judgment has yet been entered therein."

The defendants claimed that nothing was due to the plaintiffs at the time of commencing the action, as the 20th of August had not then arrived, and that, as they sold under a *del credere* commission, they were not obliged to pay over the identical money received, and could not therefore be arrested for a conversion of it.

The following is the opinion delivered at the Special Term by BARRETT, J.:

"In Ostell *v.* Brough,[1] it was held that a *del credere* commission does not necessarily destroy the factor's fiduciary relation. If he has actually received the proceeds of the sale, he is liable to arrest for a failure to pay them over. If, however, he has not received such proceeds and is sued upon his guaranty, he is not liable to arrest. The case was cited with approval in The German Bank *v.* Edwards,[2] and in Duguid *v.* Edwards.[3] The point, too, was there directly involved, while in Sutton *v.* De Camp[4] it appeared that the defendants 'had not received any part of the proceeds of the sale.' It is true that the principal must show himself entitled to the specific moneys collected by his factor. (Liddell *v.* Paton;[5] Morange *v.* Waldron.[6]) But he has done this when the relation of principal and factor is made out, and the burden is then upon the latter, if he would relieve himself from his ordinary responsibility, of showing some special agreement or bringing home to the principal some course of dealing inconsistent with the strict relation. (Duguid *v.* Edwards, above cited.)

"This brings to us a consideration of the papers. Under the above test, the plaintiffs made out a clear case for an order of arrest. The defendants' papers nowhere show any affirmative agreement giving them the right to mingle the proceeds of the sales with their own moneys. They simply aver the absence of a special agreement to remit the identical moneys collected; but that, as we have seen, is implied, and it was for them to establish the converse. Nor do they show a custom to that effect, of which the plaintiffs had knowledge. True, the defendants remitted to plaintiffs from time to time, by checks upon a particular bank; but there is no evidence that plaintiffs knew that such checks were drawn against defendants' general balance. *Non constat*, they believed that the checks were drawn against special deposits of the proceeds of the sale. As to the claim that credit was given until the twentieth of each month following the sales, it might be sufficient to say that this was disposed of by the General Term, adversely to the defendants, upon the appeal from the order vacating the attachment. But it is quite evident upon all the proofs that no agreement was made upon the subject, and that it was a mere understanding to the effect that for mutual convenience plaintiffs' agent would not call from day to day for small sums (as collected), but would take then one lump sum upon the twentieth of each month. The right to call and collect from day to day, however, remained; this disposes of the main question.[1]

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[1] 24 How. Pr. 274.
[2] 53 N. Y. 541.
[3] 50 Barb. 288.
[4] 4 Abb. N. S. 483.
[5] 7 Hun, 196.
[6] 6 Hun, 529.

"The motion to vacate the order of arrest must therefore be denied, with ten dollars costs."

Hart & Bamburger, for the appellants.

A. R. Dyett, for the respondent.

BRADY, J. The opinion of Justice BARRETT satisfactorily disposes of this appeal on the facts and the law. The defendant was a factor, and although entitled to *del credere* commission his character was not changed. His responsibility and his compensation were enlarged, but that was in fact and in law the only change accomplished by the agreement *del credere*. He guaranteed the payment of the sum for which the goods were sold, but his liability did not accrue until the purchaser failed to pay. In this case the payment was made, and the contract of liability, therefore, occurring through the *del credere* commission, was not called into existence.

The relation of factor continued, with all its obligations and burdens. The money received was the plaintiff's money and not the defendant's. It came from the plaintiff's debtor, and should have been paid to the plaintiff as his fund, whatever its amount, less the commissions earned. The identical money received was therefore the property of the plaintiffs. See Duguid *v.* Edwards,[2] cited by Judge BARRETT.

Order affirmed, with ten dollars costs and disbursements of this appeal.

DAVIS, P. J., and INGALLS, J., concurred.

Order affirmed, with ten dollars costs and disbursements.[3]

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[1] Only so much of the opinion is given as relates to this question. — ED.

[2] 50 Barb. Rep. 297.

[3] Defendants, using as their own money received from another, have been held liable to arrest as fiduciaries in the following cases.

Factors. — Schudder *v.* Shiells, 17 How. Pr. 420; Ostell *v.* Brough, 24 How. Pr. 274; Duguid *v.* Edwards, 50 Barb. 288 (reversing s. c. 32 How. Pr. 254); Farmers' Bank *v.* Sprague, 52 N. Y. 605 (*semble*); Standard Refinery *v.* Dayton, 70 N. Y. 486; Kelly *v.* Scripture, 9 Hun, 283; Williams Co. *v.* Raynor, 38 Wis. 119.

Auctioneers. — Crowther *v.* Elgood, 34 Ch. Div. 691; Holbrook *v.* Homer, 6 How Pr. 86.

Other Agents to sell. — Hutchinson *v.* Hartmont, W. N. [1877], 29; Marris *v.* Ingram, 13 Ch. D. 338; Dunaher *v.* Meyer, 1 Code Rep. 87; Ridder *v.* Whitlock, 12 How. Pr. 208; Turner *v.* Thompson, 2 Abb. Pr. 444; Barret *v.* Gracie, 34 Barb. 20; Wolfe *v.* Brouwer, 5 Robt. 601; Travers *v.* Deaton, 107 N. Ca. 500.

Agents to buy. — Noble *v.* Prescott, 4 E. D. Sm. 139; Dubois *v.* Thompson, 1 Daly, 309; Clark *v.* Pinckney, 50 Barb. 226; Obregon *v.* De Mier, 52 How. Pr. 356.

Agents to collect. — Litchfield *v.* Jones, 36 Ch. D. 530; *Re* Gent, 40 Ch. D. 190; Stoll *v.* King, 8 How. Pr. 298; Frost *v.* McCarger, 14 How. Pr. 131; Hall *v.* McMahon, 10 Abb. Pr. 319; Johnson *v.* Whitman, 10 Abb. Pr. N. S. 111; Power *v.* Davenport, 101 N. Ca. 286.

Agents to pay out. — Burhans *v.* Casey, 4 Sandf. 707; Repub. of Mexico *v.* De Arangoiz, 5 Duer, 634; Roberts *v.* Prosser, 53 N. Y. 260.

If by the understanding of the parties the receiver of the money has the right to mix it with his own, and exercises his right, he becomes a debtor, and is therefore not liable to arrest as a fiduciary, as in the following cases.

Bankers. — Bussing *v.* Thompson, 6 Duer, 696; Buchanan Co. *v.* Woodman, 1 Hun, 639; Graeffe *v.* Currie, 52 N. Y. Sup'r Ct. 554.

Factors. — Goodrich *v.* Dunbar, 17 Barb. 644; Sutton *v.* De Camp, 4 Abb. Pr. N. S. 483; Donovan *v.* Cornell, 3 How. Pr. N. S. 525.

Auctioneers. — Morange *v.* Waldron, 6 Hun, 529.

Other Agents to sell. — McBurney *v.* Martin, 6 Robt. 502; Liddell *v.* Paton, 7 Hun, 195; Robbins *v.* Falconer, 43 N. Y. Sup'r Ct. 363; Decatur *v.* Goodrich, 44 Hun, 3.

DISCHARGE IN BANKRUPTCY. — Fiduciary obligors are, in general, not allowed to plead their discharge in bankruptcy as a bar to subsequent suits by the obligees. It would seem that the word "fiduciary" in bankrupt laws should receive the same interpretation which, as we have seen, is given to it in the statutes allowing arrest. This view was strongly put by Sir George Jessel in Emmalo *v.* Grant, 17 Ch. D. 122, 128–129, and is supported by the following cases in this country, in which the discharged bankrupt continued liable.

Factors. — *Re* Seymour, 1 N. B. R. 29; *Re* Kimball, 6 Blatchf. 292; Meador *v.* Sharpe, 14 N. B. R. 492; Gilreath *v.* Holston Co., 67 Ga. 702; Banning *v.* Bleakley, 27 La. An. 257; Brown *v.* Garrard, 28 La. An. 870; Desobry *v.* Tête, 31 La. An. 809; Lemcke *v.* Booth, 47 Mo. 385; Whittaker *v.* Chapman, 3 Lans. 155; Hardenbrook *v.* Collson, 24 Hun, 475.

Auctioneers. — *Re* Lord, 5 Law Reporter, 258; Jones *v.* Russell, 44 Ga. 460.

Other Agents to sell. — Treadwell *v.* Holloway, 46 Cal. 547.

Agents to buy. — *Re* Patterson, 2 Ben. 155; Matteson *v.* Kellogg, 15 Ill. 547; Herman *v.* Lynch, 26 Kas. 435; Flagg *v.* Ely, 1 Edm. 206.

7 U.S. #11,20. *Agents to collect.* — Fulton *v.* Hammond, 11 Fed. Rep. 291; Herrlich *v.* McDonald, 80 Cal. 472; Heffren *v.* Jayne, 39 Ind. 463; White *v.* Platt, 5 Den. 269.

Agents to pay out. — Kingsland *v.* Spalding, 3 Barb. Ch. 341.

Miscellaneous Cases. — Donovan *v.* Haynie, 67 Ala. 51; Crisfield *v.* State, 55 Md. 192; Halliburton *v.* Carter, 55 Mo. 435.

But it must be admitted that in many cases the bankrupt acts have received a different interpretation, and persons, admitted by the court to be fiduciary obligors, have nevertheless been allowed to plead their discharge as a bar.

Factors. — Chapman *v.* Forsyth, 2 How. 202; Grover *v.* Clinton, 8 N. B. R. 312; Owsley *v.* Cobin, 15 N. B. R. 489; *Re* Smith, 18 N. B. R. 24; Keime *v.* Graf, 5 Reporter, 489; Zeperink *v.* Card, 11 Fed. Rep. 295; Austill *v.* Crawford, 7 Ala. 335; Chipley *v.* Frierson, 18 Fla. 639; Commercial Bank *v.* Buckner, 2 La. An. 1023; Hayman *v.* Pond, 7 Met. 328. In Woolsey *v.* Cade, 54 Ala. 378, Herrlich *v.* McDonald, 80 Cal. 472, 480 (*semble*), and Vail *v.* Durant, 7 All. 408, the same result was reached, but on the ground that a factor has the right to mix the proceeds of sales with his own money, and make himself a debtor. It is believed that the court in the leading case — Chapman *v.* Forsyth, *supra* — was unconsciously influenced by this practice of factors. At all events, the attempted distinction between fiduciary obligation within and fiduciary obligation without the bankruptcy statutes is vague and unsatisfactory.

Auctioneers. — Gibson *v.* Gorman, 44 N. J. 325.

Agents to collect. — Noble *v.* Hammond, 129 U. S. 65; Wolcott *v.* Hodge, 15 Gray. 547; Cronan *v.* Cotting, 104 Mass. 245; Woodward *v.* Towne, 127 Mass. 41; Green *v.* Chilton, 57 Miss. 598; Palmer *v.* Hussey, 87 N. Y. 303; Lawrence *v.* Harrington, 122 N. Y. 408; Williamson *v.* Dicken, 5 Ired. 259; Pankey *v.* Nolan, 6 Humph. 154.

Agents to pay out. — Bissell *v.* Couchaine, 15 Oh. 59.

Partners. — Pierce *v.* Shippee, 90 Ill. 371; Barber *v.* Sterling, 68 N. Y. 267.

Miscellaneous. — Phillips *v.* Russell, 42 Me. 360 (bailee of money for carriage); Fowles *v.* Treadwell, 24 Me. 377 (bailee for custody); Hennequin *v.* Clews, 111 U. S. 676 (affirming s. c. 77 N. Y. 427, a pledgee wrongfully transferring the pledge).

The doctrine of these cases was recognized also in Upshur *v.* Briscoe, 138 U. S. 365 (affirming s. c. 37 La. An. 138); Hervey *v.* Devereux, 72 N. Ca. 463; Jockusch *v.* Towsey, 51 Tex. 129, where the defendants were true debtors. — ED.

SHOEMAKER *v.* HINZE.

IN THE SUPREME COURT, WISCONSIN, AUGUST TERM, 1881.

[*Reported in* 53 *Wisconsin Reports*, 116.]

APPEAL from the Circuit Court for Waukesha County.

The action is to recover $40, which the complaint alleges "the defendant received from the plaintiff, as his agent, . . . to the use of the plaintiff." Demand of payment thereof before action, and neglect of the defendant to pay the same, are also alleged. The answer, in addition to the general denial, is in substance that the money was received by the defendant as a bailment, without compensation, and that it was stolen from him without his fault or neglect. The case is further stated in the opinion. The plaintiff recovered, and the defendant appealed from the judgment.

J. V. V. Platto, for the appellant.

D. H. Sumner, for the respondent.

LYON, J. The uncontradicted evidence is, that the plaintiff, when at work for the defendant, requested the defendant to take care of $40 in money for him. After some hesitation, the defendant consented to do so, and received the money. The defendant thereupon, presumably in the presence of the plaintiff, placed the money, with other money of his own, in his wallet. The next day the defendant took a small amount of money from the wallet for use, and in the evening of that day added $100 of his own money to that remaining therein. The evidence tends to show that during the same night the wallet and contents were stolen from the defendant's vest pocket, in which he had placed the same. We think the evidence shows conclusively that the parties did not contemplate or understand that the same identical money received by the defendant was to be kept for and returned to the plaintiff on demand, but only that a like sum of money should be repaid by the defendant. The transaction is not, therefore, a bailment, or special deposit, but rather what, in commercial language, is termed a general deposit, which is not a bailment, but is in the nature of a loan. Story on Bailments, §§ 41, note 2, 88. [So we think the liability of the defendant in this case is precisely the same as the liability of a bank for a general deposit made with it][1] that is, he is not liable in tort for the

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[1] Carr *v.* Carr, 1 Mer. 541, n.; Pott *v.* Clegg, 16 M. & W. 321; Foley *v.* Hill, 2 H. L. C. 28; Watts *v.* Christie, 11 Beav. 546; *Re* Agra Bank, 36 L. J. Ch. 151; Thompson *v.* Riggs, 5 Wall. 663; Bank of Republic *v.* Millard, 10 Wall. 152, 155; Phelan *v.* Iron Bank, 4 Dill. 88; *Re* Mutual Society, 15 N. B. R. 44; Southern Co. *v.* Houston, 27 Fed. Rep. 344; Moore *v.* Meyer, 57 Ala. 20, 22; Dawson *v.* Bank, 5 Ark. 283; Brohm *v.* Adkins, 77 Ill. 263; Otis *v.* Gross, 96 Ill. 612; McLain *v.* Wallace, 103 Ind. 562; Keene *v.* Collier, 1 Met. Ky. 415; Nat. Bank *v.* Eliot Bank, 20 Law Reporter, 138; Carr *v.* Nat. Bank, 107 Mass. 45, 48; Perley *v.* Muskegon Co., 32 Mich. 132;

money, but is liable in *assumpsit* for a sum equal to the sum deposited. His liability is absolute, and it is immaterial that the money was lost without his fault. The instructions to the jury related solely to the law of bailment. The view we take of the case renders it unnecessary to determine whether the judge gave the law correctly or not; for on the undisputed facts the plaintiff was entitled to recover, and the defendant could not have been injured by any error in the charge. Van Trott *v.* Weise;[1] Dufresne *v.* Weise.[2]

BY THE COURT. *The judgment of the Circuit Court is affirmed.*[3]

Bridgman v. — 73 Fed. Rep. 379.
23 Bev.

PITTSBURGH NATIONAL BANK OF COMMERCE v. McMURRAY.

IN THE SUPREME COURT, PENNSYLVANIA, OCTOBER 13, 1881.

[*Reported in* 98 *Pennsylvania Reports,* 538.]

BEFORE SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY, and STERRETT, JJ. GREEN, J., absent.

Error to the Court of Common Pleas No. 1 of Allegheny County: of October and November Term, 1881, No. 9.

Assumpsit, by George W. and William McMurray against the Pittsburgh National Bank of Commerce, to recover the sum of $1,300.

On the trial, before COLLIER, J., the following facts appeared. The plaintiffs, who lived in Noblestown, had been in the habit for several years of sending money to S. B. W. Gill, an attorney at law in Pittsburgh, as their agent and attorney, for the purpose of investment, on the understanding that Gill was to pay interest on the money from the time he received it until he invested it. On September 17, 1877, the plaintiffs sent the sum of $1,300 to Gill's office, with a message that it was for investment. Mr. Gill was absent from the city, and

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Davie *v.* Smith, 29 Minn. 201; Seward Co. *v.* Cottle, 14 Neb. 144; *Re* Franklin Bank, 1 Paige, 249; Ætna Bank *v.* Fourth Bank, 46 N. Y. 82; O'Connor *v.* M. Bank, 124 N. Y. 324; Ruffin *v.* Board, 69 N. Ca. 498; Bank *v.* Jones, 42 Pa. 536; Duncan *v.* Magette, 25 Tex. 245, 248.

[1] 36 Wis. 439.

[2] 46 Wis. 290.

[3] Mulford *v* People (Ill. 1891), 28 N. E. R. 1096 *Accord.*

In the following cases, on the other hand, the transaction amounted to a bailment of the money for safe custody or carriage, and the bailee, being free from fault, was not liable for the loss of the money. Giblin *v.* McMullin, L. R. 2 P. C. 317; Johnson *v.* Reynolds, 3 Kas. 257; Foster *v.* Essex Bank, 17 Mass. 479; First Bank *v.* Ocean Bank, 60 N. Y. 278; Tompkins *v.* Saltmarsh, 14 S. & R. 275; Lloyd *v.* West Bank, 15 Pa. 172; Scott *v.* Nat. Bank, 72 Pa. 471; Duncan *v.* Magette, 25 Tex. 245 (*semble*).

The distinction between a bailment of money and a debt is illustrated also by Coffin *v.* Anderson, 4 Blackf. 395; Mason *v.* Waite, 17 Mass. 560; Ulmer *v.* Ulmer, 1 N. & McC. 484; Richey *v.* Hathaway (Pa. 1892), 24 Atl. R. 191. — ED.

the money was left with his son and business assistant, who gave the following receipt:

"Received, Pittsburgh, September 17, 1877, of George W. and W. McMurray, the sum of thirteen hundred dollars, to be invested by me for them.
S. B. W. GILL,
H. B. GILL."

The standing arrangement that Gill was to pay interest on such funds until invested was not countermanded or alluded to. H. B. Gill, on the same day, deposited this sum in the defendant bank, to the credit of his father's general private account. Subsequently he drew from the bank, on blank checks left with him and signed by his father, sums exceeding $1,300.

Two months afterwards, it being currently rumored that S. B. W. Gill was a defaulter and had absconded, the plaintiffs demanded the sum of $1,300 from the bank, on the ground that it was trust money belonging to them. At this time the balance to Gill's credit was $1,954. The bank refused the demand. On the same day, a writ of sequestration, issued from the Orphans' Court, was served upon the bank, and the said balance standing to Gill's credit was paid to the sheriff, who afterwards, under an order of the Orphans' Court, paid the same to Gill's assignee in bankruptcy. The plaintiffs afterwards brought this suit.

The bank alleged that they had an agreement with Gill, that he was to keep a large balance on deposit to secure a line of discounts; that they received the $1,300 as Gill's money, without notice of any trust; and that, in fact, the transaction between the plaintiffs and Gill was a loan, and not a trust.

The defendant presented, *inter alia*, the following point: (5) "If the jury find that the money in question was sent to S. B. W. Gill for investment under the same arrangement as he had before that time received other moneys from plaintiffs for investment, to wit, under an arrangement that he (Gill) was to pay interest to the plaintiffs until the money should be invested, then the verdict should be for the defendant. And if the fact was as stated by William McMurray, one of the plaintiffs, that such arrangement was not countermanded when they sent the money claimed in this case to Gill, the presumption would be that the same arrangement was to continue in respect to said money as had been agreed upon before that time in respect to other moneys placed by plaintiffs in Gill's hands for investment." *Refused.* Exception.

Verdict and judgment for the plaintiffs. The defendant took this writ, assigning for error, *inter alia*, the refusal of the above point.

Thomas C. Lazear, for the plaintiffs in error.[1]

T. Walter Day, for the defendant in error.

MR. JUSTICE PAXSON delivered the opinion of the court, October 24th, 1881.

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[1] The arguments of counsel are omitted. — ED.

The defendant's fifth point ought to have been affirmed. If, as was alleged, the money was placed in Gill's hands for investment, with an understanding or agreement that until he could find a satisfactory mortgage he should pay interest thereon, the plaintiffs below cannot hold him as a trustee, nor follow his deposit in the bank as trust money. As the court below negatived the point, we must assume the jury would have found the facts as stated therein. The plaintiffs cannot treat Gill in the dual character of trustee and debtor. Undoubtedly the receipt by him of the money for investment, without more, would have made him a trustee. The money would have been trust money, and, if misapplied, could have been followed until it reached the hands of an innocent holder for value. But the agreement to pay interest necessarily implied the right to use the money. Interest is the price or consideration for the use of money. It follows that Gill became the mere banker or debtor of the plaintiffs, subject to the duty of investing the money in a mortgage when a suitable opportunity should occur. In the mean time he had the right to use it in any way his convenience or necessities required. When deposited in the bank, it was the money of Gill, not of the plaintiffs, if the facts be as stated in the point.

The remaining assignments are without merit.

Judgment reversed, and a venire facias de novo awarded.[1]

DANIEL R. PRATT AND ANOTHER *v.* BRONSON B. TUTTLE AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER 4, 1883 — JANUARY 29, 1884. FIELD & W. ALLEN, JJ., ABSENT.

[*Reported in* 136 *Massachusetts Reports*, 233.]

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HOLMES, J.[2] This is a bill in equity for an account of the net profits of the sale of certain patented wares, which were made and sold under patents belonging to, or controlled by, the plaintiffs, in pursuance of agreements between the plaintiffs and the defendants Tuttle and Whittemore. By these agreements, Tuttle and Whittemore were to purchase the patents, and, to that end, were to make and sell the patented articles, and pay over one half the net profits to the plaintiffs, until the whole agreed price was paid, whereupon the patents were to be transferred. The Tuttle and Whittemore Manufacturing Company, a corporation which has actually done the work, is joined as a defendant. All the defendants demur.

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[1] If the duty of repaying money received is absolute, there is a debt, although the parties may have described the transaction as a trust. Kershaw *v.* Snowden, 36 Oh. St. 181. And a promise of the recipient to pay interest is almost conclusive evidence against a so called trust. Upshur *v.* Briscoe, 138 U. S. 365 (affirming s. c. 37 La. An. 138); Kribs *v.* People, 82 Ill. 425; *Re* Waldron, 28 Hun, 481. (But see, as to the same transaction, Neilly *v.* Neilly, 23 Hun, 651, 95 N. Y. 382.)

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In Vincent *v.* Rogers, 30 Ala. 471, Mory *v.* Michael, 18 Md. 227, and Gutch *v.* Fosdick (N. J. Eq. 1891), 22 Atl. R. 590, the courts seem to have fallen into the same error as the parties in treating a debt as a trust. The decisions were right in all the cases except the last. But in Gutch *v.* Fosdick, although substantial justice was done, the bill was bad. See also Comstock's App., 55 Conn. 214. — ED.

48 N.J. Eq. 353; 61 Pa. 52

[2] A portion of the opinion is omitted. — ED.

There is no doubt that the bill can be maintained against Tuttle and Whittemore. They have agreed to turn over net profits as such. Their obligation is not a simple debt, like that of bankers; Foley v. Hill, 2 H. L. Cas. 28; nor a personal obligation to pay a sum of money from their general funds by way of royalty; but they have made themselves trustees, or quasi trustees, of a specific identified fund which it is alleged that they have received and not paid over. Such a fiduciary relation founds the equitable jurisdiction invoked, as well as cross demands and complexity of accounts. Badger v. McNamara, 123 Mass. 117, 119. Mackenzie v. Johnston, 4 Madd. 373. Foley v. Hill, 2 H. L. Cas. 28, 35. Padwick v. Stanley, 9 Hare, 627, 628. Hemings v. Pugh, 4 Giff. 456, 459. Moxon v. Bright, L. R. 4 Ch. 292, 295. See Barry v. Stevens, 31 Beav. 258.

Ordered accordingly.[1]

H. L. Parker, for the defendants.
F. P. Goulding, for the plaintiffs.

HAMER v. SIDWAY.

IN THE COURT OF APPEALS, SECOND DIVISION, NEW YORK, APRIL 14, 1891.

[*Reported in* 124 *New York Reporter*, 538.]

PARKER, J.[2] The question which provoked the most discussion by counsel on his appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William

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[1] Scott v. Surman, Willes, 400, 404, 405 (*semble*); Salisbury v. Cecil, 1 Cox Eq. 277 (steward); Mackenzie v. Johnston, 4 Madd. 373 (agent to sell); Hunter v. Belcher, 12 W. R. 121 (agent to sell); Union Bank v. Gillespie, 137 U. S. 411 (agent to sell); Love v. Watkins, 40 Col. 547, 567 (*semble*); Dillon v. Connecticut Co., 44 Md. 386 (agent to collect); Professor Langdell's Essay, in 2 Harvard Law Review, 259-261 *Accord.*

King v. Rossett, 2 Y. & J. 33 (agent to sell); Barry v. Stevens, 31 Beav. 258 (agent to sell), Taylor v. Turner, 87 Ill. 296 (agent to sell) *Contra.*

See also Varet v. N. Y. Co., 7 Paige, 560, 567-568; Pendergast v. Greenfield, 127 N. Y. 23, 31. — ED.

[2] Everything is omitted except that part of the opinion relating to the question of trust. — ED.

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E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, . . . William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and therefore invalid.[1] . . .

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal, that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of $5,000, and if this action were founded on that contract it would be barred by the Statute of Limitations which has been pleaded, but on that date the nephew wrote to his uncle as follows:

"Dear Uncle, — I am now 21 years old to-day, and I am now my own boss, and I believe, according to agreement, that there is due me $5,000. I have lived up to the contract to the letter in every sense of the word."

A few days later, and on February 6th, the uncle replied, and, so far as it is material to this controversy, the reply is as follows:

"Dear Nephew, — Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have $5,000 as I promised you. I had the money in the bank the day you was 21 years old that I intended for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. . . . This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. . . . W. E. Story.

"P. S. — You can consider this money on interest."

The trial court found as a fact that "said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter." And further, "That afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred, and assigned all his right, title, and interest in and to said sum of $5,000 to his wife, Libbie H. Story, who thereafter duly sold, transferred, and assigned the same to the plaintiff in this action."

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[1] The Court held the contract valid. — Ed.

We must now consider the effect of the letter, and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee and *cestui que trust?* If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient, if the property and disposition of it are definitely stated. (Lewin on Trusts, 55.)

A person in the legal possession of money or property acknowledging a trust with the assent of the *cestui que trust*, becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. (2 Story's Eq. § 972.) If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands, and stipulating for its investment on the creditor's account, will have the effect to create a trust. (Day *v.* Roth, 18 N. Y. 448.)

It is essential that the letter interpreted in the light of surrounding circumstances must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. (White *v.* Hoyt, 73 N. Y. 505, 511.) At the time the uncle wrote the letter he was indebted to his nephew in the sum of $5,000, and payment had been requested. The uncle, recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say, "I will pay you at some other time," or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had "earned" for him, so that when he should be capable of taking care of it he should receive it with interest. He said, "I had the money in the bank the day you were 21 years old that I intended for you and you shall have the money certain." That he had set apart the money is further evidenced by the next sentence: "Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it." Certainly, the uncle must have intended that his nephew should understand that the promise not "to interfere with this money" referred to the money in the bank, which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word "trust," or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: "This money you have earned much easier than I did . . . you are quite welcome to. I had it in the bank the day you were 21 years old and don't intend to interfere with it in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me." In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.

The learned judge who wrote the opinion of the General Term seems to have taken the view that the trust was executed during the lifetime of defendant's testator by payment to the nephew; but as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

The order appealed from should be reversed, and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

Order reversed and judgment of Special Term affirmed.

197 Pa.

ALLEN, ASSIGNEE OF PRIOR, A BANKRUPT, v. IMPETT AND ANOTHER.

IN THE COMMON PLEAS, APRIL 29, 1818.

[*Reported in* 8 *Taunton*, 263.]

ASSUMPSIT for money had and received. At the trial, before DALLAS, J., at the London sittings after the last term, it appeared that the defendants were trustees of the marriage settlement of the bankrupt, and that certain stock thereby settled was held by them, upon trust, to pay the dividends to the bankrupt during his life; that he had been permitted by the defendants to receive these dividends until the issuing of the commission against him, which happened in December, 1815; that in August, 1816, the defendants executed a power of attorney to a third party to receive the dividends, who accordingly received two half-years' dividends, due in April and October, 1816, and paid them over to the wife of the bankrupt, and also received another half-year's dividend, due in April, 1817, which he paid over to one of the defendants. The present action was brought to recover the total amount of these dividends. DALLAS, J., being of opinion that the defendants were liable in equity only, and that the action was not maintainable, directed a nonsuit.[1]

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[1] See Holt, N. P. 641. — ED.

Per Curiam.[1] This action is brought to recover the amount of dividends of stock to which the bankrupt was entitled, and which his trustees have received since the bankruptcy, and applied to various purposes. With full notice of the bankruptcy, they refuse to pay the money over to the assignees. There cannot be any difficulty in sustaining this action, the whole of the money having been virtually received by the trustees. *Rule absolute.*[2]

BARTLETT *v.* MARY DIMOND, Executrix of CHARLES PALMER DIMOND, Deceased.

In the Exchequer, April 17, 1845.

[*Reported in* 14 *Meeson & Welsby*, 49.]

The judgment[3] of the court was now delivered by

Pollock, C. B. This case was argued last term, and time taken for consideration. The question is, whether an action will lie against the defendant as executor, for money had and received by his testator. The testator was appointed by deed by the plaintiff, a mortgagor, and Palmer, the mortgagee, to receive the rents of the mortgaged estate, and by the terms of the deed the testator was, after allowing for the taxes and repairs to the tenants, to hold all the remaining rents in trust for the purposes in the deed specified. The purposes are, first, to pay taxes; secondly, the costs of collection; thirdly, a commission; fourthly, premiums on a policy of assurance; and, lastly, to apply the surplus in or towards satisfaction, on the 6th January and 6th July, of the accruing interest on the principal money secured, and to pay the ultimate surplus, if any, to the plaintiff, with a proviso, that if on those days, the 6th January and 6th July, the testator should have rents and profits in hand, it should be lawful for him to retain the whole or part,

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[1] Gibbs, C. J., was absent.

[2] In Case *v.* Roberts, Holt, N. P. 500 (*semble*); Hart *v.* Minor, 2 Cr. & M. 700; Roper *v.* Holland, 3 A. & E. 99; Topham *v.* Morecraft, 8 E. & B. 972; Howard *v.* Brownhill, 23 L. J. Q. B. 23; Nelson *v.* Howard, 5 Md. 327; Boughton *v.* Flint, 74 N. Y. 476; and Turner *v.* McManus, 22 New Br. 391, 398, it was held that the relation of trustee and *cestui que trust* between the defendant and plaintiff had been determined as to the subject matter of the action. The principle upon which the action at law was maintainable in the cases above cited was well expressed by Wightman, J., in Topham *v.* Morecraft, *supra*: "It seems to me impossible to maintain that if a trustee, in possession of trust money, enter into an account with his *cestui que trust*, and thereupon expressly state an account, and acknowledge that he has a fund in hand applicable to the claim made on him, he does not thereupon put an end to his character of being a trustee merely, and become liable as a debtor to an action at law brought against him in his personal capacity." See also Professor Langdell's paper on "Bills for an Account," 2 Harv. Law Rev. 242, 254. — Ed.

[3] Only the opinion of the Court is here given. — Ed.

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for the purpose of paying the premiums in that year on the policy; with other provisos. The deed contained a covenant by the testator with Palmer and with the plaintiff, that the testator, as long as he should be receiver, would use his endeavors to collect and receive, and would pay and cause to be paid, in manner and for the ends, intents, and purposes aforesaid, all the rents received by him. The testator did not execute the deed. According to the terms of this indenture, the defendant was bound, as Mr. Martin argued, to pay whatever was the balance on each 6th January and 6th July, first, in satisfying the interest, and, secondly, to pay over the then surplus to the plaintiff; and as the account stated by the executor showed a balance on some of those days, an action would have lain, not of covenant, because the defendant did not execute the deed, but of special assumpsit (because he agreed to the instrument), on the special contract to make the payments; and, as nothing more was to be done but to pay money, an action for money had and received could be maintained.

Whether, if this had been the true construction of the deed, such an action would have been supported, is not now the question, because we are all clearly of opinion that the testator was not bound, by the terms of the deed, to pay the surplus existing on each 6th January and 6th July to the plaintiff. Although there is a contract by the testator to receive and pay the moneys according to the deed, yet it is nothing more in effect than a contract to perform the trusts specified by the indenture, and all the moneys received by him under the indenture were held in trust. The testator was not a mere receiver, but a trustee, and the primary important object of his trust was to keep down the mortgage interest; and for that purpose he had a discretion, under the control of a court of equity, to keep the funds in his hands, if reasonably necessary, and was not bound, on each 6th January and 6th July, to balance his accounts, and pay over on those days the then surplus. For instance, it might happen that, on the 6th July, the trustee might know that no rents would be forthcoming in time to pay the half-year's interest due in January; and, if so, he might, without contravening the deed, keep the then surplus towards the subsequent interest. Whether he did so properly or not could not be tried by a court of law: the only remedy would be in a court of equity, which could make proper inquiries and give proper directions. So long as a trust continues, a bill in equity is the only remedy. We think that the moneys received were originally received in trust, and that the trust had not determined at the testator's death. If that trust was ended, and the testator had stated an account, or, in other words, had admitted himself to the plaintiff that he held any sum of money in his hands payable to him absolutely, he would, with respect to that sum, be a debtor, not properly a trustee, and then an action would have been maintainable against him. This is the principle upon which Roper *v.* Holland,[1] and other cases[2] referred to in the judgment of this court in the case of Pardoe v. Price,[1] was decided. The case of Allen v. Impett seems at least questionable.

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[1] 3 Ad & Ell. 99; 4 Nev. & M. 668.

[2] See Remon *v.* Hayward, 2 Ad. & Ell. 666.

There is no evidence, however, of any such statement of account. If the account rendered by the executor had been rendered by the testator, it would have been a question for the jury whether it was such a statement as to constitute the testator a debtor; but being stated by the executor as the account of the testator, it is only equivalent to evidence that such payments as therein mentioned were made by and to the testator. We therefore think the rule must be discharged.

Rule discharged.[2]

MOORE v. DARTON.

IN CHANCERY, BEFORE SIR J. L. KNIGHT BRUCE, V. C., JUNE 13, 1851.

[*Reported in* 4 *De Gex & Smale*, 517.]

THIS was an administration suit, which now came on to be heard upon exceptions to the report of the master; and the question was whether the delivery of two documents constituted a *donatio mortis causa*. The testatrix had advanced to William Moore, one of the plaintiffs, £600, and had taken from him upon that occasion the two documents in question signed by him, and which were as follows:

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"Received the 22d of October, 1843, of Miss Darton, Five Hundred Pounds, to bear interest at 4 per cent per annum, but not to be withdrawn at less than six months' notice.

"£500. WILLIAM MOORE."

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[1] 13 M. & W. 282.

[2] Deeks v. Strutt, 5 T. R. 690 (legatee); Jones v. Tanner, 7 B. & C. 542 (legatee); Edwards v. Bates, 7 M. & G. 590; Pardoe v. Price, 16 M. & W. 451; Edwards v. Lowndes, 1 E. & B. 81; Curtis v. Smith, 6 Blatch. 537, 544; White v. Sheldon, 4 Nev. 280, 294; Bishop v. Houghton, 1 E. D. Sm. 566, 571; Dias v. Brunell, 24 Wend. 9, 12 *Accord.*

128 Mass
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In Edwards v. Lowndes, *supra*, Lord Campbell said, p. 89: "It may be taken as settled that where the parties stand to each other in the relation of trustee and *cestui que trust*, and the trustee is under no other legal liability than that which arises from that relation, no action at law for money had and received can be maintained against him, though he has money in his hands which under the terms of the trust he ought to pay over to the *cestui que trust*, but which he still holds in the character of trustee only. It is unnecessary to refer upon this proposition to other authorities than that of the well considered judgment delivered by Baron Rolfe in Pardoe v. Price, 16 M. & W. 451. If, indeed, the trustee, by appropriating a sum as payable to the *cestui que trust*, or otherwise, admits that he holds it to be paid to the *cestui que trust*, and for his use, the character of the relation between the parties is changed; and the trustee does not hold it as a trustee properly so called, but as a receiver for the plaintiff's use, who may maintain an action at law for money had and received, founded upon the appropriation to his use and the liability thence arising. There are many cases that are founded upon this principle, from Allen v. Impett to Roper v. Holland, 3 A. & E. 99; and these have reference to earlier decisions." — ED.

"Received the 22d of October, 1843, of Miss Darton, for the use of Ann Dye, One Hundred Pounds, to be paid to her at Miss Darton's decease, but the interest at 4 per cent to be paid to Miss Darton.

"£100. WILLIAM MOORE."

"(I approve of the above) BETTY DARTON."

The transactions relied upon as constituting the *donatio mortis causa* took place on June the 28th, 1845, between Miss Darton and Ann Dye, who was mentioned in the second memorandum, and who was Miss Darton's lady's maid.[1]

Miss Darton died ten days afterwards.

The Master found that the £600 was an outstanding debt from the plaintiff, William Moore, who now excepted to that finding.

Mr. Swanston and *Mr. Moxon* supported the exceptions.

Mr. Walker and *Mr. Pryor* contra.

Mr. Marshall, for other parties.

THE VICE CHANCELLOR. The case as to the £100 is, I think, beyond the influence of the question whether there was a *donatio mortis causa*; for, in my opinion, an effectual trust was declared *inter vivos* in favor of the servant maid. The document relating to this sum appears to have been written contemporaneously with the creation of the debt. It is thus: [His Honor read it.] Now, although this was not then signed by Miss Darton, yet it is probable that, as she so intended the transaction, and as she received the document, she would be deemed to have assented to it, even without signing it. But in fact she afterwards signed it. Mr. Moore therefore became a trustee of the amount for Miss Darton during her life, and for Ann Dye after Miss Darton's death.

FARLEY *v.* TURNER.

IN CHANCERY, BEFORE SIR R. T. KINDERSLEY, V. C., JUNE 7, 1857.

[*Reported in* 26 *Law Journal, Chancery*, 710.]

IN December, 1856, Messrs. Farley, Turner, and Jones carried on the business of bankers at Kidderminster, and on the 9th of that month Mr. Goodwin, a customer of the bank, who had then a balance of £942 in the bank, paid in a further sum of £707. At the same time he gave specific directions to the clerk that £500 of this money was

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[1] So much of the case as relates to the *donatio mortis causa* is omitted. Both documents were given by Miss Darton, when on her death-bed, to Ann Dye, to be delivered at her death to William Moore in forgiveness of the debt. The gift was held effective as to the document for £500. — ED.

[illegible] 500 [illegible]
[illegible] which 500 [illegible] £500 [illegible]
[illegible]

lodged for the purpose of paying a bill which would become due at Messrs. Robarts & Co.'s on the 14th of December. He also wrote out the following notice, which he left with the bank clerk:

"Messrs. Farley, Turner, and Jones,

Advise Messrs. Robarts, Curtis, & Co. to pay, as under, my acceptance, dated October the 11th, at two months, due December the 14th, to J. & C. Sturge.

£500. D. W. GOODWIN."

In pursuance of these instructions, advice was immediately forwarded by the Kidderminster Bank to Messrs. Overend and Gurney to pay £500, part of the produce of various bills sent to them to discount, to Messrs. Robarts & Co. to meet Mr. Goodwin's acceptance. This was done on the 11th of December, and on the morning of the 12th Messrs. Robarts & Co. received information of the death of Mr. Turner, one of the firm of Farley, Turner, and Jones, which took place on the evening of the 11th after the bank was closed; and the firm having ceased to carry on business, the £500 was not applied in payment of the acceptance of Mr. Goodwin, but was subsequently paid over to the representatives of the estate.

It further appeared that the £707 lodged at the Kidderminster Bank by Mr. Goodwin was carried to his general banking account.

A suit was instituted for the administration of the estate of Mr. Turner, and a question was now raised upon an adjourned summons from chambers, whether the £500 so paid to Messrs. Robarts & Co. belonged to Mr. Goodwin or to the general creditors of the bank.

Mr. Baily and *Mr. Elderton* appeared for Mr. Goodwin.

Mr. Glasse and *Mr. Eddis* for the creditors of the bank.[1]

KINDERSLEY, V. C. I think that the claimant is entitled to the £500 specifically. I am fearful lest I should be influenced in my decision by this being a hard case, since hard cases often make bad law, but still I feel a strong conviction that it will be in accordance with the law to allow the claim. The matter stands in this way. Goodwin having to pay a bill which he had accepted, payable at Robarts & Co., thought fit to pay into the hands of his bankers, Messrs. Farley, Turner, and Jones, a sum of £707 in addition to the balance then standing to his credit. According to the statement in the case, it appears that at the time of paying in the £707 Goodwin told the clerk that £500 of this money was to be applied for the specific purpose of meeting an acceptance, payable at Robarts & Co.'s, to become due on the 14th. Goodwin at the same time signed the notice before stated. Now, what was the effect of this direction to the bankers? Goodwin in effect said, "There is a bill which I want paid at Robarts & Co., therefore send them £500 of this money and advise them to apply it in payment of this bill." The direction is accepted by the bankers, or by their clerk, which amounts to the same thing, and the clerk did what appears to be usual. There was no negligence on his part; at the same time he placed the whole amount of £707 to Mr. Goodwin's general banking account. He might certainly have sent up a check for £500 to Messrs. Robarts & Co., and placed the remaining sum to Mr. Goodwin's account; but he took the ordinary course and sent up the £500, debiting Mr. Goodwin's banking account with that sum, and they informed Robarts & Co. that such a bill would be presented. Now, it so happened that the Kidderminster Bank had other bills, more or less under similar circumstances, which they wanted paid at Robarts's bank, and they sent up a batch of bills to Messrs. Overend and Gurney for them to discount, and directed them to pay the amount into Robarts & Co.'s bank for the purpose of meeting other bills, as well as that for £500. It appears to me that the course pursued was the same as if, having no occasion to pay more than the £500 bill, they had simply sent up the specific amount with a direction to pay that particular bill. It is true that the money was not ear-marked as if it had been locked up in a box, but it is a portion of the £707 which had been paid in expressly for the purpose of meeting the bill for £500. The facts of this case differ, I think, from the cases cited. I admit that the money is not a particular deposit with the bankers, but it is money placed in their hands to be applied in a particular way. What I now decide will not trench upon the authorities which decide that money paid into a banker's is not a deposit which you may receive back in the identical notes and sovereigns, but that it is a debt. That is quite a different case. Under the circumstances, I am of opinion that the £500 belongs specifically to Goodwin, and not to the general creditors of Mr. Turner.[1] The costs will come out of the general estate.

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[1] The arguments of counsel are omitted. — ED.

IN RE BARNED'S BANKING COMPANY (LIMITED). MASSEY'S CASE.

IN CHANCERY, BEFORE LORD ROMILLY, M. R., MAY 6, 1870.

[*Reported in* 39 *Law Journal, Chancery,* 635.]

A BILL of exchange for £185 drawn by Massey on a Mr. Fox was by the latter accepted, payable at the office of Messrs. Prescott & Co., the correspondents in London of Barned's Banking Company.

In pursuance of an arrangement with Fox, Massey, on the 17th of April, 1865, (being the day before the bill became due,) paid into the office of Barned's Banking Company at Liverpool (with which neither Massey nor Fox kept any account) the proper amount to be remitted to Prescott & Co., in order to take up the bill on its becoming due. On the following day the bank stopped payment without having made the remittance to Prescott & Co.; the bill was in consequence dishonored, and was subsequently paid by Massey, who now claimed in the winding up of the bank to recover the whole amount paid to it for remittance to London as aforesaid.

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[1] Fisher *v.* Miller, 7 Moore, 527; St. Louis *v.* Johnson, 5 Dill. 241; Drovers' Bank *v.* O'Hare, 119 Ill. 646; Union Bank *v.* Dumond, 38 Ill. Ap. 102; Cutler *v.* American Bank, 113 N. Y. 593 *Accord.* — ED.

[illegible] a bl v xchng [illegible] acptd [illegible] Robo. [illegible] agrmt w F. [illegible] bl [illegible] B. [illegible] Robo. [illegible] B [illegible] wh[illegible] amt. [illegible] crdtrs.

81 Fed. 602; 150 Ill. 501; 165 Ill. 103

Mr. Roxburgh and *Mr. Badcock*, for Massey, relied on Farley *v.* Turner, submitting that their case was stronger than that of the creditor in that case, inasmuch as here neither drawer nor acceptor was a customer of the bank.

Sir R. Baggallay and *Mr. Kekewich*, for the official liquidator of the company, were not called upon.

THE MASTER OF THE ROLLS. This is a different case from Farley *v.* Turner. There the country bank, after receipt of the money, and instructions from Goodwin to pay the bill which was about to fall due at the office of their London correspondents, Robarts & Co., remitted bills to Overend and Gurney for discount, directing the latter to hand the proceeds to Robarts & Co., to provide them with funds to meet the bill. Robarts & Co. accepted the money for the purpose, but afterwards, having heard of the stoppage of the country bank, held their hands, and allowed the bill to be dishonored. The question then arose, for whom they held the money provided to meet the bill, whether for the general creditors of the country bank, or Goodwin, and it was held to be for the latter. There the country bank had applied the money, and the town agent had received it for the specific purpose. Here there was no application of the money, and Mr. Massey has no lien, but merely a right to prove along with the general creditors.[1]

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[1] Johnson *v.* Whitman, 10 Abb. Pr. N. S. 111 *Contra* — Nat. Bank. Reg. 601 -

A deposit of money in a bank, which agrees in consideration thereof to meet a liability from the depositor to a third person is often regarded as a trust. But, in the absence of evidence that the money was delivered as a special deposit, the transaction does not create a trust, but only an obligation of the banker to the depositor to pay out of its general assets the claim of the third person. The depositor may sue in special *assumpsit* for the breach of this obligation. Hill *v.* Smith, 12 M. & W. 618. Whether the third person may sue on this promise will depend upon the law, in a given jurisdiction, as to promises to one person of performance to another. In England, therefore, the beneficiary has no right against the banker. Williams *v.* Everett, 14 East, 582; Stewart *v.* Fry, 7 Taunt. 339; Yates *v.* Bell, 3 B. & Al. 643; Wedlake *v.* Hurley, 1 Cr. & J. 83; Cobb *v.* Becke, 6 Q. B. 930, 933, per Patteson, J.; Moore *v.* Buchell, 27 L. J. Ex. 3; Henderson *v.* Rothschild, 33 Ch. D. 459. See, to the same effect, Wilson *v.* Lizardi, 15 La. 255; Conery *v.* Webb, 12 La. An. 282; Nicholson *v.* Crook, 56 Md. 55.

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In the United States, generally, the opposite rule prevails. But the promisee may defeat the beneficiary's right by a release or modification of the banker's duty at any time before the beneficiary has expressed his assent to the original obligation. Moore *v.* Meyer, 57 Ala. 20, 22 (*semble*); Mayer *v.* Chattahoochee Bank, 51 Ga. 325; Brockmeyer *v.* Nat. Bank, 40 Kas. 376, 744; Simonton *v.* First Bank, 24 Minn. 216; Butler *v.* Duprat, 51 N. Y. Sup'r Ct. 77; Ætna Bank *v.* Fourth Bank, 46 N. Y. 82; First Bank *v.* Higbee, 109 Pa. 130. But see, *contra*, *Re* Le Blanc, 14 Hun, 8.

If there is a mere deposit with directions to the banker, but no agreement by him

STEELE *v.* CLARK.

IN THE SUPREME COURT, ILLINOIS, JUNE TERM, 1875.

[*Reported in* 77 *Illinois Reports*, 471.]

MR. JUSTICE BREESE delivered the opinion of the Court. This proceeding was commenced before the County Court of Clinton County, and taken by appeal to the Circuit Court, wherein a judgment was rendered for the plaintiffs for four hundred and forty-four dollars, and costs, from which judgment this appeal is prosecuted by the defendants. It is a case in which the administrator of one Thomas Moore, deceased, presented a claim for allowance against the estate of John Brewster, deceased, for one thousand dollars. The county court allowed the claim to the extent of seven hundred and seventy-seven dollars, and, on appeal to the Circuit Court, the same was reduced to the above sum of four hundred and forty-four dollars.

A brief statement of the facts will show that this judgment ought not to stand.

It appears that Thomas Moore, the father of Thomas Moore in behalf of whose estate this claim is prosecuted, died in 1852 or 1853, leaving an estate in land, which descended to his son Robert Moore, this Thomas Moore, and a granddaughter, Mary Stephens; that, in 1850, Thomas Moore the younger, then about twenty years of age, left this State for California, and has not been heard from since 1866. In 1853 proceedings were instituted for a partition of the estate of Thomas Moore, senior, and one Alfred Tucker was appointed a commissioner to make partition and pay over the proceeds to these several heirs, each share amounting to four hundred and forty-four dollars, which the commissioner received in money, and paid to John Brewster, deceased, the guardian of Mary Stephens, her share, to Robert Moore his share, and, without any authority whatever as appears, paid to Robert his brother Thomas's share. In 1859 or 1860, Robert Moore, being in debt to his brother Thomas in this sum of four hundred and forty-four dollars, and also to other parties, agreed to sell his farm to Brewster to pay his debts, and among them this debt to his brother Thomas. For what price the farm was sold does not appear. Brewster's administrator proved one payment of more than two hundred dollars to one Fouke, a creditor of Robert, and offered to show for what the farm was sold by Robert Moore to him. This evidence the court refused to admit. The defence was the Statute of Frauds and Perjuries and the Statute of Limitations.

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to pay out of his general assets the depositor's liability to a third person, the last has, obviously, no right against the banker. *Ex parte* Heywood, 2 Rose, 355; Grant *v.* Austen, 3 Price, 58; Seaman *v.* Whitney, 24 Wend. 260; Lane *v.* Magdeburg (Wis. 1891), 51 N. W. R. 582; Caisse *v.* Tharp, 5 Can. Pr R. 265. — ED.

To sustain the recovery, it is urged by appellee that this was a trust fund, and the recovery not barred by the Statute of Limitations. It is claimed and argued by appellee that Brewster, in his lifetime, had become security for the payment of the money received by Robert Moore, belonging to his brother Thomas, which fact, they insist, gives it the character of trust money, and not barred by the Statute of Limitations. A careful examination of the record betrays the existence of no such fact. Neither Dougherty, Dill, the Clarks, nor Mrs. Pratt, called for appellee, state anything of the kind. The simple fact is, that Brewster, on the purchase of Robert Moore's farm, undertook to pay this debt Robert then owed his brother Thomas. As Dougherty states it, Brewster told his brother he had bought Robert Moore's farm, and had become paymaster to Thomas for Robert Moore. This was in 1860. At this time, the relation of these parties was that of debtor and creditor.

It has been settled, by repeated decisions of this court, that, in case of simple contracts, the person for whose benefit a promise is made may maintain an action in his own name upon it, although the consideration does not move from him. Eddy *v.* Roberts,[1] Brown *v.* Strait,[2] Bristow *v.* Lane,[3] where the English and American authorities are considered.

In 1860, when this promise was made by Brewster to Robert Moore, admitting it was made, Thomas Moore had a clear right of action against Brewster to recover the amount, had he chosen to accept Brewster as his creditor, and, if dead, his administrator had a right of action for five years thereafter. These proceedings were instituted more than thirteen years thereafter, and some years after the death of Brewster.

Under this state of fact, we are at a loss to perceive why the claim was not barred by the Statute of Limitations. We fail to see in the transaction any indication of a trust, to any greater extent than any ordinary assumpsit by one person, for a valuable consideration, to pay a debt he owes to a third party, instead of paying to the party with whom he contracted.

A court of equity has jurisdiction in all cases of strict trust, but where a mere confidence is reposed, or a credit given, it will not exercise such jurisdiction. As this Court said, in Doyle *v.* Murphy,[4] the various affairs of life, in almost every act between individuals in trade and commerce, involve the reposing of confidence or trust in each other, and yet it has never been supposed that, because such confidence or trust in the integrity of another has been extended and abused, therefore a court of equity would, in all such cases, assume jurisdiction.

It is true, as there said, when property is conveyed or given by one person to another, to hold for the use of a third person, such a trust would thereby be created as would give equity jurisdiction to compel the application to the purposes of the trust. But such is not this case. Here was the sale of a farm by the owner, to pay his debts, among which was this debt due his brother Thomas, and which Brewster assumed to pay. It is an ordinary case of debtor and creditor, and the Statute of Limitations was a bar to a recovery.

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[1] 17 Ill. 505. [2] 19 ib. 89. [3] 21 ib. 194. [4] 22 ib. 502.

This money, when in the hands of Tucker, the commissioner, was a trust fund, from which he had no right, of his own mere motion, to part, and place in the hands of Robert Moore, who is not shown to have had any authority to receive it. There can be no doubt the estate of Thomas Moore has a right of action against Tucker, to recover this money, with interest.

There are some objections made on excluding the testimony of Steele, one of the administrators of Brewster, called by the defence. We see no grounds for excluding his testimony, he being called to state what he knew of the case before he became administrator, and afterwards. At first blush he seems to have been competent, not being within any of the exceptions of section 2, chapter 51, R. S. 1874, title "Evidence and Depositions."

It was also error to exclude the testimony of French, as offered by appellant, and also that of Parks, as to the price to be paid for the farm, and how it was paid.

For the errors above discussed, the judgment is reversed and the cause remanded. *Judgment reversed.*[1]

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[1] *Re* Empress Co., 16 Ch. Div. 125, 127, 129, per Jessel, M.R.; Douglass *v.* Martin, 103 Ill. 25 (no relief in equity); Arnwine *v.* Carroll, 4 Hal. Ch. 620 (no relief in equity); Robinson *v.* Denson, 3 Head, 395, 397 (*semble*) *Accord.*

But see, *contra*, Albretch *v.* Wolf, 58 Ill. 186 (Statute of Limitations no bar); Carley *v.* Graves, 85 Mich. 483 (plaintiff not obliged to come in with general creditors in case of bankruptcy).

The distinction between a trust and a purely personal obligation in the nature of a debt is illustrated by certain cases of assignment of partnership assets to a partner If the assignment is upon trust to pay out of the assets the firm creditors, they will be preferred to the separate creditors of the assignee partner Payne *v.* Hornby, 25 Beav. 280; Topliff *v.* Vail, 1 Harring. Ch. 340; Renfrew *v.* Pearce, 68 Ill. 125; Parker *v.* Merritt, 105 Ill. 293; Robinson *v.* Roose (Ill. 1891), 28 N. E. R. 821; Talbot *v.* Pierce, 14 B. Mon 195; Harmon *v.* Clark, 13 Gray, 114, Wildes *v* Chapman, 4 Edw. Ch. 669; Deveau *v.* Fowler, 2 Paige, 400 (see Robb *v.* Stevens, 1 Clarke, Ch. 195); High *v* Lack, Phill. Eq (N Ca.) 175, Buck Co. *v* Johnson, 7 Lea, 282, Rogers *v.* Nichols, 20 Tex. 719; Shackelford *v.* Shackelford, 32 Grat. 481.

If, on the other hand, the assignment to the partner is absolute, the assignors being content to take the assignee's personal agreement to pay the firm liabilities, and if the assignment is not fraudulent, the firm creditors will have no greater rights against the firm assets so transferred than against any other assets of the assignee partner. And if that partner becomes insolvent, the firm creditors will either get nothing until the separate creditors are paid in full, (*Ex parte* Freeman, Buck, 471; *Ex parte* Appleby, 2 Dea. 482; Thomas *v* Shillibeer, 1 M. & W. 124; *Re* Isaacs, 3 Sawy. 35; Robb *v* Mudge, 14 Gray, 534, Wild *v* Dean, 3 All. 579; Scull *v.* Alter, 16 N. J. 147;) or, in jurisdictions where a stranger to the promise may sue the promisor, they may share ratably with the separate creditors. *Re* Downing, 3 N. B. R. 748; *Re* Long, 9 N B. R. 227; *Re* Rice, 9 N. B. R. 373; *Re* Collier, 12 N. B. R. 266; *Re* Lloyd, 22 Fed. Rep. 88; Hoyt *v* Murphy, 18 Ala. 316; Devol *v.* McIntosh, 23 Ind 529; Dunlap *v.* McNeil, 35 Ind. 316; Goudy *v.* Werbe, 117 Ind 154 (*semble*). — ED.

M'FADDEN *v.* JENKYNS.

IN CHANCERY, BEFORE LORD LYNDHURST, C., JUNE 21, 22, NOVEMBER 4, 1842.

[*Reported in* 1 *Phillips*, 153.]

IN the month of February, 1811, Thomas Warry lent the sum of £500 to the defendant Jenkyns. In the month of December following, Thomas Warry died, and the defendant George Warry, having shortly afterwards, as his personal representative, brought an action against Jenkyns to recover the £500, this bill was filed, alleging that the money was originally intended to be repaid in a short time, but that, soon after the loan had been made, Thomas Warry sent a verbal message to Jenkyns by one Bartholomew, a common friend of theirs, desiring him no longer to consider the money as due to him, Thomas Warry, but to hold it "upon trust for the plaintiff, to be at her absolute disposal, for her own use and benefit." That Bartholomew delivered the message, and Jenkyns accepted the trust; and that the transaction was communicated to the plaintiff both by Thomas Warry and by Jenkyns, and that Jenkyns afterwards, during the lifetime of Warry, and with his knowledge, paid to the plaintiff the sum of £10 in part execution of the trust; and that Thomas Warry had never afterwards demanded payment of the money, or any part of it.

The bill prayed that it might be declared that, under those circumstances, Jenkyns became and was a trustee of the £500 for the plaintiff, and that he might be decreed to pay the £490 residue thereof to the plaintiff, and that the defendant George Warry might be restrained from further proceeding in his action against Jenkyns.

The case made by the bill was verified by the affidavits of the plaintiff, Bartholomew, and Jenkyns, and upon those affidavits Vice Chancellor Wigram granted an injunction to restrain the prosecution of the action until the hearing of the cause, the plaintiff submitting to pay the £500 into court.

The defendant George Warry now moved, by way of appeal, before the Lord Chancellor, that the Vice Chancellor's order might be discharged.

Mr. Wakefield and *Mr. Kenyon*, in support of the appeal motion.

Mr. Sharpe and *Mr. G. Russell*, *contra.*[1]

THE LORD CHANCELLOR. This was an appeal from a judgment of Vice Chancellor Wigram,[2] upon a motion for an injunction to stay proceedings at law. The facts stated in support of the motion were shortly these. The testator, Thomas Warry, had lent a sum of £500 to the defendant Jenkyns, to be returned within a short period.

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[1] The arguments of counsel are omitted. — ED.

[2] Reported in 1 Hare, 458. — ED.

Some time afterwards Warry sent a verbal direction to Jenkyns to hold the £500 in trust for Mrs. M'Fadden. This he assented to, and, upon her application, paid her a small sum, £10, in respect of this trust. The main question was, whether, assuming the facts to be as stated, this transaction was binding upon the estate of Thomas Warry. The executor had brought an action to recover the £500 so lent to Jenkyns. It is obvious that the rights of the parties could not, with reference to this claim, be finally settled in a court of law; and, if the trust were completed and binding, an injunction ought to be granted.

Some points were disposed of by the Vice Chancellor in this case, which are indeed free from doubt, and appear not to have been contested in this Court, viz. that a declaration by parol is sufficient to create a trust of personal property; and that if the testator, Thomas Warry, had, in his lifetime, declared himself a trustee of the debt for the plaintiff, that in equity would perfect the gift to the plaintiff as against Thomas Warry and his estate. The distinctions upon this subject are undoubtedly refined, but it does not appear to me that there is any substantial difference between such a case and the present. The testator, in directing Jenkyns to hold the money in trust for the plaintiff, which was assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable. It was equivalent to a declaration by the testator that the debt was a trust for the plaintiff.[1]

The transaction bears no resemblance to an undertaking or agreement to assign. It was in terms a trust, and the aid of the court was not necessary to complete it. Such being the strong inclination of my opinion, and corresponding, as it appears to do, with that of the learned judge in the court below, and with the decision of the Master of the Rolls in the case to which he refers,[2] I cannot do otherwise upon this motion, and in this stage of the cause, than refuse the application.

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[1] Lord Lyndhurst is not alone, among eminent judges, in failing to discriminate between a trust and a debt. Lord Cranworth, in Burrowes v. Gore, 6 H. L. C. 907, 947, thought an agreement to give a sum of money as a marriage portion made the obligor a trustee, "because, if a person agrees to give a sum of money as an inducement to another to marry his daughter, and that marriage takes place, in that case the parent who so agrees to give the money is considered as holding the money upon trust." Lord Chelmsford seems, p. 942, to have entertained the same view. But this opinion was conclusively answered by two of their associates. Lord St. Leonards said, p. 951: "It is rather difficult to say how he is to be trustee of his own property. If he had agreed to give his own estate, or any tangible thing that was actually marked out, then of course he would have become a trustee, because he would have agreed to give and settle that identical property; but if he agrees to pay a sum of money out of his own assets, I do not see how that can constitute him a trustee to bind him in all respects in that relation." Lord Wensleydale, p. 968, is even more explicit. "The obligor held nothing in trust. He is, as he would be in the other supposed cases, a debtor merely. It seems to me, with great respect to my noble and learned friend, somewhat overstrained to say that the appellant can be treated, by virtue of the recital of the settlement, as if he had already paid himself the whole £2,000 in cash, and had it in his hands." See to the same effect Morgan v. Lariviere, L. R. 7 H. L. 423; Rice v. U. S., 21 Ct. Cl. 413. — ED.

[2] Wheatley v. Purr, 1 Keen, 551. — ED.

I must not, however, be understood as pronouncing any conclusive opinion upon the facts of the case. The witness Bartholomew, a professional gentleman, I believe, swears distinctly and in positive terms as to the direction given by the testator; but there are some improbabilities in the case, and it is difficult to say, as the Vice Chancellor justly observes, what may be the result at the hearing of the cause. As the appeal appears to have been encouraged, if not suggested, by the Vice Chancellor, the motion must be refused without costs.[1]

IN RE CAPLEN'S ESTATE. BULBECK v. SILVESTER.

IN THE CHANCERY DIVISION, BEFORE SIR GEORGE JESSEL, M. R., JANUARY 29, 1876.

[*Reported in* 45 *Law Journal Reports*, 280.]

THE testatrix, Ann Caplen, in June, 1865, lent the sum of £300 to her niece's husband, Morris Stening, on the security of his promissory note for £300 and interest, payable on demand. She received the interest during the rest of her life, and made no demand for payment of the note. Ann Caplen died on the 30th of May, 1875, and after her death the note was found uncancelled among her papers by her executors, George Silvester and John Walls, who demanded payment. It was then alleged, on the part of Gainor Bulbeck, Ann Caplen's sister, that about September, 1872, Ann Caplen told Morris Stening she wanted him to hold the £300 for the benefit of Gainor Bulbeck and her daughters, Mrs. Stening, Mrs. Edwards, and Mrs. Harvey; and directed him after her own death to pay the interest to Gainor Bulbeck during her life, and to divide the principal sum among her said daughters after her decease.

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[1] In Rycroft *v.* Christy, 3 Beav. 238; Meert *v.* Moessard, 1 Moo. & P. 8; Roberts *v.* Roberts, 12 Jur. N. S. 971 (reversing S. C. 11 Jur. N. S. 992); Parker *v.* Stones, 38 L. J. Ch. 46; Minchin *v.* Merrill, 2 Edw. 333, 339 (*semble*); Eaton *v.* Cooke, 25 N. J. Eq. 55; Hurlbut *v.* Hurlbut, 49 Hun, 189, — there was, as in the principal case, a novation, and the beneficiary was successful. See also Owings *v.* Owings, 1 Har. & G. 484.

In Vandenberg *v.* Palmer, 4 K. & J. 204, Wood, V. C., found sufficient evidence of intention on the part of the creditor to make *himself* trustee. In Paterson *v.* Murphy, 11 Hare, 88, a mortgagee by a certain writing directed his mortgagor to invest £200, part of the mortgage debt, when it became due, in consols, and after the decease of the mortgagee to transfer the consols and pay the dividends to certain persons named. Before any investment was made, the mortgagee countermanded the instructions, but it was decided by the same judge that the first writing created an irrevocable trust in favor of the persons therein named. This case, like the overruled statements in Richardson *v.* Richardson, *infra*, illustrates the extreme length to which this learned Vice Chancellor was ready to go in treating improper gifts as trusts. See, further, Lambe *v.* Orton, 1 Dr. & Sm. 125; Maguire *v.* Dodd, 9 Ir. Ch. 452. — ED.

The case was verified by the affidavit of Morris Stening, and Gainor Bulbeck and her daughters deposed that Ann Caplen had in similar terms communicated to them her intention with regard to the £300.

The question whether this direction created a trust of the £300 was, by arrangement, raised on a summons in a suit for the administration of Ann Caplen's estate, which summons was now adjourned into court.

Mr. Colt, for Gainor Bulbeck. A parol declaration is enough to create a trust of personal property. The direction to hold the £300 for Mrs. Bulbeck and her children was equivalent to a declaration by the testatrix that the debt was to be held on trust for them. M'Fadden *v.* Jenkyns.

[THE MASTER OF THE ROLLS. The difficulty you have to contend with is, that the note was payable on demand. As payment was not demanded, there was no debt.]

The direction was equivalent to a demand. Instead of saying, "Pay me," the testatrix said, "Pay my sister and her daughters after my death"; and the debtor assented. Even admitting that, strictly speaking, you cannot create a trust unless you confer a legal title on the trustee. Richards *v.* Delbridge. Here a legal title was, in fact, conferred. The obligation on a promissory note payable on demand may be discharged by parol. Foster *v.* Dawber.[1] What took place was equivalent to a release of the debt, in consideration of the debtor agreeing to apply the money as directed. The testatrix did not intend to release the debtor, except upon terms of payment to these persons. The money was at home in the debtor's hands, and there was no need or indeed power to give him a right to sue. The testatrix, therefore, did all in her power, save the formality of giving up the security, to create a trust, and I submit that a trust was well created.

Mr. B. B. Swan, for the executors, was not called on.

THE MASTER OF THE ROLLS. The evidence does not satisfy me that Mrs. Caplen intended to create an irrevocable trust. Whether she did or not, it is clear that at law she remained owner of the note, and did not therefore create a complete trust. The question that I have to decide is, whether the direction to Mr. Stening was enough to make him a trustee. Mr. Colt argued that it was, for he said the direction impressed a trust on the money, and a declaration of trust by the legal owner was not wanted. I think, however, that a mere agreement on the part of the debtor to apply the money according to the direction of the creditor will not do. There is no magic in words, and, as I explained in Richards *v.* Delbridge, a man may make himself a trustee without declaring that he is a trustee in so many words; but he must do something or other that is equivalent to declaring that he is a trustee. In M'Fadden v. Jenkyns, Lord C~~ottenham~~ hancellor certainly said: "The testator, in directing Jenkyns to hold the money in trust for the plaintiff, which was assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable." But I do not think that applicable to the present case, where there is nothing to show that the owner of the note intended to part with her legal title to the money.

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[1] 6 Ex. 839.

I think, therefore, that the executors are entitled to require payment of the note.[1]

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[1] Chandler v. Chandler, 62 Ga. 612; Evans's Estate, 6 Pa. Co. 437 *Accord.* See also Kelly v. Roberts, 40 N. Y. 432; Fairchild v. Feltman, 32 Hun, 398. Gaskell v. Gaskell, 2 Y. & J. 502, ~~is~~ hardly to be supported, as the facts seem to show a complete novation. The case ~~is~~ criticised adversely in Vandenberg v. Palmer, 4 K. & J. 204, 214–215. — ED.

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SECTION II.

A Trust distinguished from a Bailment.

ANONYMOUS.

IN THE COMMON PLEAS, EASTER TERM, 1339.

[*Reported in Year Book* 12 *&* 13 *Edward III.*, 244.]

DETINUE of chattels to the value of £100 against an Abbot by a man and his wife, on a bailment, made by the father of the wife when she was under age, of chattels to be delivered to his daughter, when she was of full age, at her will; and they counted that he delivered pots, linen, cloths, and £20 in a bag sealed up, &c. — *Pole.* He demands money, which naturally sounds in an action of Debt or Account; judgment of the count. — *Stouford.* We did not count of a loan which sounds in Debt, nor of a receipt of money for profit, which would give an action of Account, but of money delivered in keeping under seal, etc., which could not be changed; and if your house were burnt, that would be an answer. — SCHARDELOWE.

Answer over.[1]

ASHLEY'S ADMINISTRATORS AND HEIRS *v.* DENTON.

IN THE COURT OF APPEALS, KENTUCKY, APRIL 13, 1822.

[*Reported in* 1 *Littell*, 86.]

PER CURIAM. Thomas Denton and wife exhibited this bill in chancery against the administrators of Thomas Ashley, deceased, charging that said decedent was the son of the female complainant by a former husband; that during her widowhood she became possessed of sundry slaves, which passed to her from the estate of a deceased relative in North Carolina, where she resided, and that she removed with them to Kentucky, in some of the upper counties; that she intrusted the negroes aforesaid with her said son, for the purpose of his going in search of a suitable residence for her, and there making preparations for her family, and then he was to return and move her to it; that the son took possession of the slaves, for the purposes aforesaid, and, to her astonishment, did not return, nor was he heard of for several years, and was then discovered, by a person employed for the purpose of searching for him, to be living, with the slaves aforesaid, in the State of Tennessee. Some time after his discovery, he removed to the new county of Butler in this State, where he resided until his death, in 1817. That, after his return to Kentucky, he refused to surrender them, when demanded; that they were increased, and are in the possession of said administrators and heirs. They allege that they are fully able to substantiate said facts by proof, and pray that the restoration of the slaves may be decreed, with payment of the hire.

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[1] A bailment of goods by A to B, to deliver to C, or for the use of C, gave C, as in the principal case, the right to maintain detinue against B. Y. B. 34 Ed. I. 239 (*semble*); Y. B. 39 Ed. III. 17 A; Y. B. 3 Hen. VI. 43–20; Y. B. 9 Hen. VI. 38–13; Y. B. 9 Hen. VI. 60, A–8; Y. B. 18 Hen. VI. 9, A–7; Y. B. 19 Hen. VI 41–84; Y. B. 21 Hen. VI. 29–13; Y. B. 39 Hen. VI. 44–7; Y. B. 5 Ed. IV. 85; Y. B. 9 Ed. IV. 52–15; Y. B. 21 Ed. IV. 55–27; Brand *v.* Lifley, Yelv. 164; Evans *v.* Marlett, 1 Ld. Ray. 271; Atkin *v.* Barwick, 1 Stra. 165; Hill *v.* Secretan, 1 B. & P. 315; Haille *v.* Smith, 1 B. & P. 563; Berly *v.* Taylor, 5 Hill, 577; Sturtevant *v.* Orser, 24 N. Y. 538; Edwards *v.* Campbell, 23 Barb. 423; Brown *v.* O'Brien, 1 Rich. 268; Magdeburg *v.* Uihlein, 53 Wis. 165 *Accord.* — ED.

The defendants, in their answer, insisted that there was no equity in the bill, and that the remedy was at law. The court below decreed the slaves to be restored, and the hire to be paid. From this decree the administrators and heirs of Ashley appealed.[1]

It is now contended that the Chancellor had no jurisdiction of the case, and that the remedy of the appellee is properly at law. On the other side, it is insisted that the claim of the appellants is founded on a trust, and that the son took and held the slaves for the use of his mother, and therefore the Chancellor properly entertained jurisdiction of the case.

It is true that uses and trusts are a favored part of the jurisdiction of the Chancellor, and frequently he will, on that ground, decide in cases where the law may be adequate to give relief. But, notwithstanding this acknowledged authority, it cannot be extended to every case where one party has trusted another, or, in other words, placed a confidence which has been abused. If so, every case of bailment, and every instance of placing chattels by loans or hire, would be swallowed up by courts of equity. Nay, every case where credit was given for debt or duty would soon be drawn into the same vortex. It ought, then, to be confined to cases of controlling legal rights, vested and remaining in trustees, created as such in some proper mode, and not be extended to all cases of abused confidence. If the case, therefore, of the appellee is to be tested by the original bill alone, we have no doubt it makes out no case for the interposition of the Chancellor; that placing the slaves in the possession of her son, for the purpose of preparing and improving her a home, and his right then to cease, was not such a trust as would sustain the bill, and that she had a plain and adequate remedy at law.[2]

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[1] Only so much of the case is given as relates to the point of jurisdiction. — ED.

[2] By the old Teutonic law a bailor's remedy did not extend beyond the bailee. If the bailee bailed or sold the goods, or lost them against his will, the sub-bailee, the

purchaser, and even the thief, were secure from any attack by the original bailor. This doctrine persisted for centuries in Germany and France. Heusler, Die Gewere, 487; Carlin, Niemand kann auf einen Anderen mehr Recht übertragen als er selbst hat, 42, 48; Jobbé-Duval, La Revendication des Meubles, 80, 165. In England the ancient tradition was maintained in the fourteenth century. Y. B. 24 Ed. III. 41, A–22. *Thorpe* (a judge three years later): "I cannot recover against any one except him to whom the charter was bailed"; Y. B. 43 Ed. III. 29–11. *Belknap* (afterwards C. J.): "In the lifetime of the bailee Detinue is not given against any one except the bailee, for he is chargeable for life." See also 3 Harv. L. Rev. 33.

It is hardly necessary to add that the conception of a genuine right *in rem* has long been familiar, and that a bailor may now have Detinue or Trover against any subsequent possessor as well as against the bailee. McCombie *v.* Davis, 6 East, 538; Baehr *v.* Clark (Iowa, 1891), 49 N. W. R. 840; Galvin *v.* Bacon, 11 Me. 28; Stanley *v.* Gaylord, 1 Cush. 536; Saltus *v.* Everett, 20 Wend. 267; Wooster *v.* Sherwood, 25 N. Y. 278; Howland *v.* Woodruff, 60 N. Y. 73, 79; Edwards *v.* Dooley, 120 N. Y. 540; Church *v.* Melville, 17 Oreg. 413. — Ed.

SECTION III.

A Trust distinguished from an Equitable Charge.

HODGE *v.* CHURCHWARD.

In Chancery, before Sir Launcelot Shadwell, V. C., December 11, 1847.

[*Reported in* 16 *Simon*, 71.]

John Churchward, by his will, dated the 10th of December, 1808, devised certain freehold and copyhold tenements to his son Matthew for life, without impeachment of waste: "after his decease to the first, second, third, and fourth sons, and so on, lawfully begotten, paying to my wife, Grace Churchward, his mother, £16 a year of lawful money of Great Britain, quarterly, for life; also to my daughter, Mary Churchward, £10 a year of lawful money of Great Britain, quarterly, for life."

The testator died in February, 1809, and thereupon the son entered into and had continued ever since in possession of the tenements. He paid his mother her annuity of £16 a year until her death; and he paid his sister her annuity of £10 a year for some years after the testator's death; but had not made any payment in respect of it since 1817. The bill was filed in August, 1846, by the sister and her husband, claiming to be paid the arrears of her annuity.

Matthew Churchward insisted, by his answer, that the claim was barred by the Statute of Limitations, 3 & 4 Will. IV. chap. 27.[1]

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[1] § 24. "No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which . . . he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such an interest, or right in or to the same as he shall claim therein in equity."

§ 25. "Provided . . . that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust* . . . to bring a suit against the trustee . . . shall be deemed to have first accrued . . . at and not before the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration," ~~&c.~~, & shall then be deemed to have accrued as agai such pur chaser o person cl aig throu him.

Prior to this statute there was no statutory bar to the right to enforce an equitable charge upon land in the nature of an annuity. Collins *v.* Goodall, 2 Vern. 235; Aston *v.* Aston, 1 Ves. 263; Pomfret *v.* Windsor, 2 Ves. 483; Stackhouse *v.* Barnston, 10 Ves. 453. Nor did this statute apply to such charges upon personalty. Roch *v.* Callen, 6 Hare, 531; *Re* Ashwell's Will, Johns. 112.

In the absence of local statutes a charge like that in the principal case is enforceable in this country indefinitely. Perkins *v.* Cartmell, 2 Del. Ch. 102; Pettingill *v.*

Mr. Shebbeare, for the plaintiff, argued that the word "paying" made the obligation to pay the annuity a personal *trust;* inasmuch as that word referred to the person who was to make the payment, and not to the property out of which it was to be made; and consequently that the plaintiff's claim was saved by the 25th section of the act. Ward *v.* Arch;[1] Young *v.* Lord Waterpark.[2]

Mr. Malins and *Mr. Whitbread*, for the defendant, said that the word "paying" made the annuity a rent charge; and therefore the case was within the second and third sections of the act.

THE VICE CHANCELLOR. The word "paying" creates, not a trust, but a charge or condition; and therefore the plaintiff's claim is barred by the statute. *Bill dismissed with costs.*

JACQUET *v.* JACQUET.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JUNE 12, 15, 1859.

[*Reported in* 27 *Beavan*, 332.]

THE testator was resident in Jamaica. He had two plantations, called "Content" and "Epsom." By his will, dated in 1832, the testator requested his executors to "pay and discharge his funeral expenses and all just and legal demands that might be against him." "with the payment of which (he said) I do charge and make liable all my property in Jamaica both real and personal," &c. "It is my desire, ~~and I do~~ hereby direct, that my executors hereinafter named, or such of them as shall qualify under this my will, do dispose of the freehold of Content plantation, with the buildings thereon," &c., "the moneys arising from the sale thereof to be applied to the liquidation of my debts, and the overplus (if any) to fall into the residue of my

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Pettingill, 60 Me. 411; Crawford *v.* Severson, 5 Gill, 443; Greenwood *v.* Greenwood, 5 Md. 334; Kane *v.* Bloodgood, 7 Johns. Ch. 90, 116. In Millington *v.* Hill, 47 Ark 301, Loder *v.* Hatfield, 71 N. Y. 92, and Yearly *v.* Long, 40 Oh. St. 27, a devise of land charged with an annuity was so worded as to impose a personal liability upon the devisee in the nature of a debt. It was held that, as soon as the statute barred the personal claim, the right to enforce the equitable charge was also barred.

If the devisee was in fact a trustee, i. e. if the land was devised to him upon trust to pay the annuity, the case was not within § 24 of the statute of 3 & 4 Will. IV. c. 27. Ward *v.* Arch, 12 Sim. 472; Young *v.* Waterpark, 13 Sim. 204, 15 L. J. Ch. 63; Cox *v.* Dolman, 2 D. M. & G. 592; Playfairs *v.* Cooper, 17 Beav. 187; Snow *v.* Booth, 8 D. M. & G. 69; Knight *v.* Bowyer, 2 DeG. & J. 421; Bright *v.* Larcher, 27 Beav. 130; Obee *v.* Bishop, 1 D. F. & J. 137; Commissioners *v.* Wybrandt, 7 Ir. Eq. 580. But the rule applied in these cases was materially modified in England by 37 & 38 Vict. c. 57, § 10. Hughes *v.* Coles, 27 Ch. D. 231. — ED.

[1] 12 Sim. 472.

[2] 13 Sim. 204.

estate. All the rest, residue and remainder of my property in Jamaica, but subject to the payment of my debts and legacies comprised of Epsom plantation," &c., "and everything else on the plantation or elsewhere in Jamacia, of whatsoever nature and kind," he gave, devised, and bequeathed to certain persons whom he named.

The testator died in 1834, and in 1843 the plantations were sold to Philip Jacquet and the money was in court. The Chief Clerk found that a debt of £318 was still due to Spicer, and that he had a claim to that amount on the trust funds. The question was, whether the real estate was charged with the debt, and whether his remedy against the estate and the produce was or not barred by the Statute of Limitations.

The plaintiff took out a summons to vary the certificate by finding that he had no claim on the trust funds.

THE MASTER OF THE ROLLS. I think that this will created a trust for the payment of debts as regards the Content plantation; but with respect to the other plantation there is a mere charge of debts. I am of opinion that the statute does not apply as regards the Content estate; but I wish to consider whether the transaction of 1843 amounted to a sale to Mr. Philip Jacquet, in consideration of his paying a sum of money into court; because, if it did, I am of opinion that the fund is affected by the trusts specified by the will, and is now applicable to the payment of the debts.

I came to the conclusion that the debts were charged on the whole of the property, but the trust was limited to the Content estate, which the testator directed to be sold by his executors, and the produce applied in payment of his debts. The testator died in 1834, and, under the Statute of Limitations, passed in 1837, the lapse of twenty years bars any power of recovery in respect of the charge,[1] but it does not bar the right of recovery as regards the Content estate, as to which a trust was created.[2]

I think the result of the transaction in 1843 is, that Philip Jacquet is the purchaser for value of the Content estate, and from that time the statute begins to run in his favor under the 25th section of 3 & 4

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[1] Francis *v.* Grover, 5 Hare, 39; Proud *v.* Proud, 32 Beav. 234; Dickerson *v.* Teasdale, 1 D. J. & S. 52; Dundas *v.* Blake, 11 Ir. Eq. 138.; 3 Ap. Ca. 974

Prior to the statute 3 & 4 Will. IV. c. 27, there was no limitation of time within which a charge upon land for the payment of debts and legacies must be enforced. Fergus *v.* Gore, 1 Sch. & Lef. 107; Hargreaves *v.* Michell, 6 Mad. 326. Crallan *v.* Oulton, 3 Beav. 1. See also *supra*, 55, n. 1.

[2] *Trust to pay Legacies.* — Gough *v.* Bult, 16 Sim. 323; Watson *v.* Saul, 1 Giff. 188; Thomson *v.* Eastwood, 2 App. Cas. 215.

Trust to pay Debts. — Hughes *v.* Wynne, T. & R. 307; Blower *v.* Blower, 5 Jur. N. S. 33; Kelly *v.* Kelly, 6 Ir. L. Rec N. S. 222; Dillon *v.* Cruise, 3 Ir. Eq. R. 70; Blair *v* Nugent, 9 Ir. Eq. R. 400; Hunt *v.* Bateman, 10 Ir. Eq. R. 360; U. S. Bank *v.* Beverly, 1 How. 134; Carrington *v.* Manning, 13 Ala. 611, 632, 640 (*semble*); Steele *v.* Steele, 64 Ala. 438, 460 (*semble*); Starke *v.* Wilson, 65 Ala. 576, 579 (*semble*); Alexander *v.* McMurry, 8 Watts, 504; Baldy *v.* Brady, 15 Pa. 103, 111. (But see Man *v.* Warner, 4 Whart. 455; Trinity Church *v.* Watson, 50 Pa. 518.) *Accord.* — ED.

Will. IV. c. 27; but as against the produce of the Content estate, the statute does not apply, and it remains liable for the payment of the testator's debts. I cannot make out how much of the fund in court is attributable to the Content estate, and that must be ascertained by an inquiry.

I will, however, make this declaration: that so much of the money now in court as is properly attributable to the purchase of the Content estate, under the deed of 1843, is applicable to the payment of Mr. Spicer's debt.

SECTION IV.

A Trust of a Chose in Action distinguished from an Assignment

HAMMOND *v.* MESSENGER.

In Chancery, before Sir Lancelot Shadwell, V. C.,
July 5, 1838.

[*Reported in* 9 *Simon*, 327.]

The Vice Chancellor.[1] If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this Court allows, in the first instance, a bill to be filed, against the debtor, by the person who has become the assignee of the debt. I admit that, if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this Court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this Court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor.

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If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances.

The only question then is, whether, on this record, there are any special circumstances which create a ground for a court of equity to entertain the bill against the debtor.

The bill sets out with a statement that a partnership was carried on between Wilks and Wooler; and a variety of instruments and transactions are stated, the result of which was, that the partnership was to be dissolved, that the plaintiff was to pay the debts due from the partnership, and to be entitled to the partnership assets. Then it represents that Messenger, the demurring party, at the time of the agreement for the dissolution of the partnership, was justly indebted to the firm in the sum of £80 for coal and coke sold and delivered to him by

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[1] The statement of the case, arguments of counsel, and a portion of the opinion are omitted. — Ed.

the firm, and that Messenger is now indebted to the plaintiff in the said sum of £80 as the assignee of such debt. Therefore the debt in question was, purely, a debt recoverable at law. Then the bill states a notice given to Messenger by the plaintiff to pay the debt to him. It then states that on the 2d of October the plaintiff called on Messenger, and applied to him for payment of the sum of £80, and fully apprised him of the plaintiff's right and title to demand and receive payment of it from him; that Messenger, for the first time, pretended that the plaintiff was not entitled to receive the debt, but that he was bound to pay it to Wilks and Wooler. That, of itself, creates no equitable ground.

The bill then alleges, in the usual manner, that the plaintiff had applied to Messenger for the payment of the debt, and that Messenger, combining and confederating with Wilks, had refused so to do, and pretended that there was no such debt: that, however, gives no equity. Then it charges that Messenger, on receiving notice of the plaintiff's right and title to the debt, became and still was a trustee of it for the plaintiff. That again does not make him a trustee, that is to say, such a trustee as the plaintiff has a right to sue in equity, unless the whole circumstances of the case taken together, do show that the plaintiff has a right to sue in equity.

When I come to the prayer, I find that it, first of all, prays, "that Messenger may be decreed to pay to the plaintiff the sum of £80, so due to the firm of Wilks and Wooler as aforesaid, or, if necessary, that an account may be taken." Now no case whatever is stated to show the necessity for an account, and therefore it must, of necessity, stand as a mere prayer that Messenger may be decreed to pay the debt. It then proceeds as follows: "or that the plaintiff may be at liberty to use the name of the defendants, Wilks and Wooler, in an action at law to be brought by him against Messenger." There is, however, no case stated which shows that Wilks & Wooler have at all interfered to prevent, or that they intend to prevent the plaintiff from using their names at law.

It seems to me that this case is altogether denuded of those special circumstances, the existence of which is the only ground for this Court to lend its aid to a party who, like the plaintiff, has taken an assignment of a debt; and, consequently, the demurrer must be allowed.[1]

Demurrer allowed, with liberty to the plaintiff to amend his bill.

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[1] Cator *v.* Burke, 1 Bro. C. C. 434; Keys *v.* Williams, 3 Y. & C. Ex. 462; Clark *v.* Cort, Cr. & Ph. 154, 159 (*semble*); Rawson *v.* Samuel, Cr. & Ph. 161, 178 (*semble*); Wilson *v.* Short, 6 Hare, 366, 382; Bolton *v.* Powell, 14 Beav. 275, 2 D. M. & G. 1, s. c.; De Pothonier *v.* Mattos, E. B. & E. 461, 467; Hoskins *v.* Holland, 44 L. J. Ch. 273; Roxburghe *v.* Cox, 17 Ch. D. 520, 526 (*semble*); Hayward *v.* Andrews, 106 U. S. 672; Chicago Co. *v.* Nichols, 57 Ill 464; Adair *v.* Winchester, 7 Gill & J. 114; Walker *v.* Brooks, 125 Mass. 241 (correcting the statements in 2 Story, Eq. Jur. § 1057*a*, and Story, Eq. Pl. § 153); Carter *v.* United Co., 1 Johns. Ch. 463; Ontario Bank *v.* Mumford, 2 Barb. Ch. 596, 615; Smiley *v.* Bell, Mart. & Y. 378; Moseley *v.* Boush, 4 Rand. 392 *Accord.* The common law right of the assignee to use the assignor's name is

ROBERTS *v.* LLOYD.

In Chancery, before Lord Langdale, M. R., February 18, March 21, 1840.

[*Reported in* 2 *Beavan*, 376.]

On the 25th of October, 1821, Lord Mostyn and Mr. Mostyn executed a bond in a penal sum for securing to Rebecca Roberts the sum of £1,000 and interest; and on the 12th day of February, 1828, Rebecca Roberts, having three daughters, Jane, the wife of James Batten, the plaintiff, Maria Catherine Roberts, and the defendant Margaret Roberts, executed a deed poll, whereby, after reciting the bond, and that the sum of £1,000 remained due thereon, and that she was desirous of making provision for her daughters and the children of her daughter Jane, she assigned to the defendant David Lloyd, his executors, administrators, and assigns, the said bond and the money due thereon, and her right and interest in and to the same, on trust to permit her, Rebecca Roberts, to receive the interest thereof during her life, and after her death to pay her daughter Jane the sum of £333 6*s.* 8*d.*, being one third of the said sum of £1,000, and as to the sum of £666 13*s.* 4*d.*, the remaining two thirds of the money due on the bond, on trust to place out the same in government or other good securities, or to allow the same to remain on the present security, and to permit her daughter, the plaintiff, and the defendant Margaret, to receive the interest and dividends thereof during their joint lives; and after the death of either to permit the other to receive the interest of one moiety thereof, and to pay the other moiety to the children of Jane Batten; and after the death of the survivor of the plaintiff and her sister Margaret, to divide the remainder of the £1,000 amongst the children of Jane Batten; and the deed poll contained a power of attorney to enable David Lloyd to get in the debt.

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recognized also in Phillips *v.* Wilson, 25 Ill. Ap. 427; Troeder *v.* Hyams, 153 Mass. 536; Coffey *v.* White, 17 Phila. 236. See also Aulton *v.* Atkins, 18 C. B. 249, 260.

Taylor *v.* Reese, 44 Miss. 89; Townsend *v.* Carpenter, 11 Oh. 21, Kerr *v.* Steeves, 22 New Br. 124 *Contra.*

The doctrine of the principal case results from the fact that the so called assignment of a chose in action is, in reality, a power of attorney for the attorney's own benefit, i. e. the *procuratio in rem suam* of the Roman law. 2 Bl. Com. 442; 1 Spence, Eq. Jur. 181; 3 Harv. L. Rev. 340, 341; Banfill *v.* Leigh, 8 T. R. 571; Duffield *v.* Elwes, 1 Bligh, N. S. 506, per Sugden; Gerard *v.* Lewis, L. R. 2 C. P. 305, 309; James *v.* Newton, 142 Mass. 366, 371.

Conversely, a document in the form of a power of attorney to collect a chose in action for the attorney's benefit, will be treated as an assignment under a statute relating to assignments. Watson *v.* Bagaley, 12 Pa. 164. See also Keys's Estate, 137 Pa. 565; Read *v.* Long, 4 Yerg. 68.

It is because a partial assignment of a chose in action does not operate as a power of attorney that the partial assignee has no remedy at law, but only in equity. See *infra*, p. 63, n. 1. — Ed.

At the request of Mrs. Roberts, Lord Mostyn paid to Jane Batten £333 6*s.* 8*d.*, being the amount of her future interest.

By articles of agreement dated the 23d of May, 1831, between Mr. Lloyd of the one part, and William, Joseph, and Jane, the three children of Jane Batten, of the other part, Mr. Lloyd promised to give an order on Lord Mostyn for £300, and the three Battens promised to pay Mr. Lloyd £15 annually in lieu of the lawful interest of the £300, and to indemnify Mr. Lloyd. Pursuant to these articles, Mr. Lloyd gave the order, and Lord Mostyn paid £100 on the 25th of April, and £200 on the 29th of August, 1831.

On the 28th of March, 1832, Lord Mostyn paid the Battens, ~~the~~ further sum of £66 13*s.* 4*d.*, and shortly afterwards July 27 £100 more. These payments were made in consequence of an agreement between Lloyd and the Battens similar to that of May 23, 1831.

On the 11th of June, three days after the execution of the last mentioned bond, Mr. Lloyd signed an order for payment by Lord Mostyn to James Batten of another sum of £100, and Lord Mostyn accordingly paid it on the 27th of July, 1832.

There was no evidence of any further act or interference on the part of Mr. Lloyd.

Mrs. Roberts died on the 22d of November, 1832, and Jane Roberts was appointed executrix of her will. At the time of Mrs. Roberts's death, the sum of £200 remained due on the bond; and on the 30th of November Lord Mostyn paid it to Jane Batten and James Batten, as it seemed, without any order or authority from Mr. Lloyd.

This bill was filed by Maria C. Roberts, who sued *in forma pauperis*, and it prayed a declaration that the defendant David Lloyd had committed a breach of trust in respect of the sum of £666 13*s.* 4*d.*, part of the sum of £1,000 which was secured to be paid by the defendant Lord Mostyn to Rebecca Roberts, deceased; and that the same sum of £666 13*s.* 4*d.* might be secured, and that Lord Mostyn might be declared to be answerable to the plaintiff for £200 paid by him, and for any other sum which he paid with knowledge of the trusts in the bill mentioned.[1]

Mr. Pemberton and *Mr. Kenyon*, for the plaintiff.

Mr. James Russell, for the defendant Lloyd.

Mr. Stuart and *Mr. Parry*, for Lord Mostyn.

The Master of the Rolls. It is plain that Mr. Lloyd was fully aware of the bond, and of the deed poll, and of the trusts conferred upon him; that he accepted the trusts, and took an active part in procuring payment from Lord Mostyn of different sums of money for purposes inconsistent with the trusts which he had accepted. There are the articles of the 23d of May, 1831, reciting the bond and deed poll, his consent to the payment of one third part of the sum of £1,000 to Jane Batten, and showing the arrangement under which he was to procure payment of a further sum of £300, upon having payment of the interest thereof secured to himself. There is not, as against him, direct evidence of an order for the payment of the £66 13*s.* 4*d.*, but there is the subsequent bond, reciting that the sum of £300 remained due to him, and this was the sum actually due after deducting the £66 13*s.* 4*d.*

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[1] The statement of the case has been abridged, and the arguments of counsel, together with a part of the opinion of the Court, have been omitted. — Ed.

It is clear, therefore, that not by his acquiescence alone, but by his acts, the three sums, amounting together to £466 13*s.* 4*d.*, were withdrawn from the security of Lord Mostyn's bond. Now it is evident that Lord Mostyn had notice that the bond had been assigned to Mr. Lloyd, and he had recognized Mr. Lloyd as the person upon whose order the money was to be paid. On the 29th of August, 1831, he took from James Batten a receipt, stating that the money was paid by virtue of an order made by Mr. Lloyd, and that the money was part of a bond debt originally due to Rebecca Roberts, and afterwards by her conveyed to David Lloyd on trust for uses. On the 28th of March, 1832, he paid the sum of £66 13*s.* 4*d.* on a like receipt, stating an order of Mr. Lloyd, and that the money was due on bond to Rebecca Roberts, and assigned by her to David Lloyd, on trust for certain uses; and in July, 1832, he paid the further sum of £100 on the order of Mr. Lloyd, which has been proved.

I do not think that Lord Mostyn is answerable for any of these sums: he had the authority of Mr. Lloyd for paying them, and was, I think, justified in making the payments.

But with respect to the £200 paid after the death of Mrs. Roberts, he had no authority whatever; he paid the money on the receipt of Jane and James Batten, and on delivery up of the bond; but he knew that the right to the money due on the bond had been transferred to Mr. Lloyd, on trust for certain uses; and I think that he might, and if he had been duly cautious would, have refused payment without the authority of Mr. Lloyd; and that, if an attempt had been made to compel payment at law, this Court would have protected him; and, under these circumstances, I think that for the £200 and the interest of it, he is answerable to Mr. Lloyd and the persons for whom Mr. Lloyd is trustee.[1]

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[1] Jones *v.* Farrell, 1 DeG. & J. 208; Pannell *v.* Hurley, 2 Coll. 241; West London Bank *v.* Reliance Society, 29 Ch. Div. 954, 27 Ch. D. 187; St. Johns *v.* Charles, 105 Mass. 262; Monmouth Co. *v.* Hutchinson, 21 N. J. Eq. 107. - accord

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PARTIAL ASSIGNMENT OF A CHOSE IN ACTION. — A partial assignment resembles a total assignment of a chose in action in so far that the debtor, after notice of the assignment, pays the assignor the full amount of the debt at his peril. Brice *v.* Bannister, 3 Q. B. Div. 569; Field *v.* Mayor, 6 N. Y. 179; Brill *v.* Tuttle, 81 N. Y. 454, Jones *v.* Mayor, 47 N. Y. Sup'r Ct. 242. But see, *contra*, Fairgreaves *v.* Lehigh Co., 2 Phila. 182.

But the legal operation of a partial assignment is in other respects widely different from that of a total assignment. The partial assignee, for instance, unlike the total assignee, is not an attorney with power to sue in the assignor's name, and accordingly acquires no rights at common law. Reg. *v.* Allen, Owen, 2; Anon., Owen, 46; Fairlie

Pymt to assignor in ignorance of assignment discharges oblgr: L. R. 5 C P 589, 593
176 Pa 616

I am therefore of opinion, that the plaintiff is entitled to have the £466 13*s.* 4*d.* paid into court by Mr. Lloyd, and the £200 paid by Lord Mostyn, and that she and her sister are entitled to have the interest paid according to the trusts of the deed poll, and, although a pauper, entitled to costs.

v. Denton, 8 B. & C. 395; Liversidge *v.* Broadbent, 4 H. & N. 603; Mandeville *v.* Welch, 5 Wheat. 277; Fire Co. *v.* Felrath, 77 Ala. 194; Hassie *v.* G. I. W. U. Cong., 35 Cal. 378; Grain *v.* Aldrich, 38 Cal. 514; Chapman *v.* Shattuck, 8 Ill. 49; Phillips *v.* Edsall, 127 Ill. 535; Groves *v.* Ruby, 24 Ind. 418; Ellidge *v.* Straughn, 2 B. Mon. 81; Bank *v.* Trimble, 6 B. Mon. 599; Getchell *v.* Maney, 69 Me. 442; Exchange Bank *v.* McLoon, 73 Me. 498; Gibson *v.* Cooke, 20 Pick. 15; Palmer *v.* Merrill, 6 Cush. 282; Papineau *v.* Naumkeag, 126 Mass. 372; Love *v.* Fairfield, 13 Mo. 300; Beardslee *v.* Morgner, 73 Mo. 22; Loomis *v.* Robinson, 76 Mo. 488; Superintendent *v.* Heath, 15 N. J. Eq. 22; Brown *v.* Dunn, 50 N. J. 111; Bower *v.* Hadden Co., 30 N. J. Eq. 171, 340; Field *v.* Mayor, 6 N. Y. 179; Stanbery *v.* Smythe, 13 Oh. St. 495; Jermyn *v.* Moffatt, 75 Pa. 399; Carter *v.* Nichols, 58 Vt. 553; Brooks *v.* Hatch, 6 Leigh, 534; S. V. R. Co. *v.* Miller, 80 Va. 821; First Bank *v.* Kimberlands, 16 W. Va. 555.

But in equity the partial assignee is fully protected almost everywhere. Row *v.* Dawson, 1 Ves. Sr. 331; Yeates *v.* Groves, 1 Ves. Jr. 280; *Ex parte* South, 3 Sw. 392; *Ex parte* Alderson, 1 Mad. 53, s. c.; Lett *v.* Morris, 4 Sim. 607; Tibbits *v.* George, 5 A. & E. 107; McGowan *v.* Smith, 26 L. J. Ch. 8; *Ex parte* Hall, 10 Ch. Div. 615; *Ex parte* Moss, 14 Q. B. D. 310; Trist *v.* Child, 21 Wall. 441, 447 (*semble*); Peugh *v.* Porter, 112 U. S. 737; Grain *v.* Aldrich, 38 Cal. 514; Daniel *v.* Meinhard, 53 Ga. 359; Pomeroy *v.* Manhattan Co., 40 Ill. 398; Phillips *v.* Edsall, 127 Ill. 535; Groves *v.* Ruby, 24 Ind. 418; Lapping *v.* Duffy, 47 Ind. 51; County *v.* Hinkley, 62 Iowa, 637 (*semble*); Ellidge *v.* Straughn, 2 B. Mon. 81; Bank *v.* Trimble, 6 B. Mon. 599; Exchange Bank *v.* McLoon, 73 Me. 498; James *v.* Newton, 142 Mass. 366 (*semble*); Canty *v.* Latterner, 31 Minn. 239; Moody *v.* Kyle, 34 Miss. 506; Whitney *v.* Cowan, 55 Miss. 626; Christie *v.* Sawyer, 44 N. H. 298; Superintendent *v.* Heath, 15 N. J. Eq. 22; Bower *v.* Hadden Co., 30 N. J. Eq. 171, 340; Shannon *v.* Mayor, 37 N. J. Eq. 123; Kirtland *v.* Moore, 40 N. J. Eq. 106; Stanbery *v.* Smythe, 13 Oh. St. 495 (*semble*); Richardson *v.* Rust, 9 Paige, 243; Field *v.* Mayor, 6 N. Y. 179; Cook *v.* Genesee Co., 8 How. Pr. 514; Hall *v.* Buffalo, 2 Abb. App. 301, 1 Keyes, 193, s. c.; Parker *v.* Syracuse, 31 N. Y. 376; People *v.* Comptroller, 77 N. Y. 45; Risley *v.* Phenix Bank, 83 N. Y. 318; Etheridge *v.* Vernoy, 74 N. Ca. 800; Caldwell *v.* Hartupee, 70 Pa. 74 (but see, as to claims against a municipality, Phila.'s Ap., 86 Pa. 179; Geist's Ap., 104 Pa. 351); Sykes *v.* First Bank (S. Dak., 1891), 49 N. W. R. 1058; Gardner *v.* Smith, 5 Heisk. 256; Harris Co. *v.* Campbell, 68 Tex. 22; Railway *v.* Gentry, 69 Tex. 625; Claflin *v.* Kimball, 52 Vt. 6; Carter *v.* Nichols, 58 Vt. 553 (*semble*); Burditt *v.* Porter, 63 Vt. 296 (*semble*); S. V. R. Co. *v.* Miller, 80 Va. 821; First Bank *v.* Kimberlands, 16 W. Va. 555; Brown *v.* Johnston, 12 Ont. Ap. 190 (*semble*).

But see, *contra*, Wilson *v.* Carson, 12 Md. 54; Burnett *v.* Crandall, 63 Mo. 410; Loomis *v.* Robinson, 76 Mo. 488; Rice *v.* Dudley, 34 Mo. Ap. 383; Reed *v.* Foote, 36 Mo. Ap. 470; Mo. Co. *v.* Wright, 38 Mo. Ap. 141. (Compare Fourth Bank *v.* Noonan, 88 Mo. 372, 14 Mo. Ap. 243, s. c.)

A partial assignment of a chose in action should be carefully distinguished from a total assignment, partly for the benefit of the assignee, and in trust as to the residue for the assignor, e. g. an assignment by way of mortgage of a claim larger than the mortgage debt. Such a total assignment is a perfect power of attorney. The so-called assignee may therefore collect the entire claim at law and retain his own share, but must account for the residue to the assignor. Burlinson *v.* Hall, 12 Q. B. D. 347; Tancred *v.* Delagoa Bay, 23 Q. B. D. 239; Wetmore *v.* San Francisco, 44 Cal. 294; Tripp *v.* Brownell, 12 Cush. 376; Macomber *v.* Doane, 2 All. 541; Darling *v.* Andrews, 9 All. 106; Warren *v.* Sullivan, 123 Mass. 283; Keys's Estate, 137 Pa. 565. The distinction here suggested was overlooked in Loomis *v.* Robinson, 76 Mo. 488. — **Ed.**

FRANCIS B. FOGG, AND MARY, HIS WIFE, *v.* JOHN IZARD MIDDLETON AND HENRY MIDDLETON.

IN THE COURT OF APPEALS, SOUTH CAROLINA, FEBRUARY, 1837.

[*Reported in 2 Hill, Chancery,* 591.]

MRS. MARY MIDDLETON, in her lifetime, conveyed by deed to her second son, Mr. J. I. Middleton, her large real estate; and by a will, purporting to be her last will and testament, disposing of her personal estate, bequeathed the greater part thereof between her two sons, and gave considerable pecuniary legacies (as is alleged, and which does not seem to be contradicted) to each of her daughters (except Mrs. Manigault, who was dead). Afterwards, she executed another will, and died in 1814, leaving the same in full force, by which she disposed of the bulk of her personal estate to her two sons, subject to certain legacies, and particularly a legacy to each of her daughters of £100 sterling, which was greatly below the legacies under the former will.

The personal estate of Mrs. Middleton was appraised at upwards of seventy-one thousand dollars.

Some discontents naturally arose in the minds of daughters so slightly provided for by a wealthy parent, who bestowed so large a fortune on her sons. These discontents reached the ears of Mr. J. I. Middleton, with the exaggerated report that the use or the abuse of his personal influence over an aged mother had produced the effect of diminishing her bounty to her daughters, by her last will and testament, to his benefit. Being disturbed by these reports he determined to relinquish the amount to which his sisters would have been entitled under the former will of their mother, and accordingly executed bonds in trust to his brother, Mr. Henry Middleton, with conditions for the payment of certain sums for the eldest daughter of each of his sisters, and placed them in the possession of his brother, Mr. Henry Middleton. He then went to Europe, about 1817, and has remained there ever since, leaving his estate, including the personal estate, the slaves derived from his mother's will, in the hands of his brother, Henry, as his attorney and agent; and to apply the income of the estate to the payment of the debts of her estate, and the legacies under her will. The debts have been paid, and the bond to Mr. Izard's family has been paid, but no payment has been made on the bond for the obligor's niece, Miss Mary Rutledge, now the wife of Mr. Fogg, the plaintiff. After many years, applications were made, by letters to Mr. Henry Middleton, as the agent and attorney of Mr. J. I. Middleton, for payment, which applications, being unattended to, the bill was filed in this Court, which makes this case.

CHANCELLOR DE SAUSSURE made a decree for the plaintiffs, from which the defendants appeal.

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Petigru, for appellants.

Grimke, *contra*.

CHANCELLOR JOHNSTON delivered the opinion of the Court.[1]

Under the decided cases, the delivery of the bond would have been established upon even less evidence than was furnished on the trial. As it is, the proof fully sustains the Chancellor's conclusion on the fact.

The law of the case seems to admit of little doubt.

Cases have been quoted to show that equity will not aid a mere volunteer, where no legal right has passed, or where the action of this Court is necessary to constitute the relation of trustee and *cestui que trust*.

But the delivery and acceptance of the bond, *ipso facto*, constituted Mr. Henry Middleton trustee. The bond contained his commission, and set forth his duties.

It also vested in him the debt of which it was the evidence; and if that debt should be detained, he had a legal remedy to recover it.

Wherever a trustee has accepted a trust, he is bound to a diligent discharge of his duties. If he holds choses in action, with a clear remedy on them, it is unfaithful in him not to endeavor to enforce them. If he holds a bond, even although that bond is a free gift, he has no right to remit it.[2]

It never was the law that a trustee was not as amenable to a volunteer *cestui que trust* as to one who is not a volunteer. If that were the law, no executor would be accountable to collateral legatees.

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[1] A portion of the opinion is omitted, and the statement of the case is abridged. — ED.

[2] Wigram, V. C., states the same doctrine very clearly in Fletcher *v.* Fletcher, 4 Hare, 67, 74, 75: "The first proposition relied upon against the claim in equity was, that equity will not interfere in favor of a volunteer. That proposition, though true in many cases, has been too largely stated. A court of equity, for example, will not, in favor of a volunteer, enforce the performance of a contract in specie. That it will, however, sometimes act in favor of a volunteer, is proved by the common case of a volunteer on a bond, who may prove his bond against the assets. Again, where the relation of trustee and *cestui que trust* is constituted, as where property is transferred from the author of the trust into the name of a trustee, so that he has lost all power of disposition over it, and the transaction is complete as regards him, the trustee, having accepted the trust, cannot say he holds it, except for the purposes of the trust; and the Court will enforce the trust at the suit of a volunteer. According to the authorities, I cannot, I admit, do anything to perfect the liability of the author of the trust, if it is not already perfect. This covenant, however, is already perfect. The covenantor is liable at law, and the Court is not called upon to do any act to perfect it. One question made in argument has been, whether there can be a trust of a covenant the benefit of which shall belong to a third party; but I cannot think there is any difficulty in that. Suppose, in the case of a personal covenant to pay a certain annual sum for the benefit of a third person, the trustee were to bring an action against the covenantor; would he be afterwards allowed to say he was not a trustee? If he cannot do so after once acknowledging the trust, then there is a case in which there is a trust of a covenant for another. In the case of Clough *v.* Lambert, 10 Sim. 174, the question arose; the point does not appear to have been taken during the argument, but the Vice Chancellor of England was of opinion that the covenant bound the party; that the *cestui que trust* was entitled to the benefit of it; and that the mere intervention of a trustee made no difference." — ED.

So that, without going further than Mr. H. Middleton, the plaintiffs have a right to come here to compel him to perform his trusts.

But if he is liable, it results that he may be compelled also to surrender to his *cestui que trusts* all the legal remedies he possesses. And this puts the plaintiffs in possession of the bond, to all intents, as if it had been drawn to them as obligee, or assigned to them.

If it had been drawn to the plaintiffs by Mr. John Izard Middleton, or assigned to them by Mr. Henry Middleton, will it be pretended that the plaintiffs could not recover from the obligor, even if it was given on no consideration? If it had been given on a consideration, which failed, that would be a good defence. But the original want of consideration would be none.

If the Court, in this case, travels beyond the case of the *trustee* and *cestui que trusts*, and takes cognizance of the liabilities of the obligor, it is at the instance of the defendants, who insisted on his being made a party. Being here at his own instance, the Court will, to prevent circuity of action, decree against him what he would have been liable to pay the defaulting trustee, or what the plaintiffs could recover if the bond had been assigned to them.[1]

The motion is dismissed.

Chancellors JOHNSON and HARPER concurred.

Chancellor DE SAUSSURE absent, from indisposition.

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[1] The right of a *cestui que trust* of an obligation to have a subpœna against his trustee, who refused to enforce the claim, has been recognized from very early times: (1391) 3 Rot. Parl. 297; Y. B. 2 Ed. IV. 2–6; Rose *v.* Clarke, 1 Y. & C. C. C. 534, 548; *Re* Uruguay Co., 11 Ch. D. 372 (*semble*); Thompson *v.* R. R. Co., 6 Wall. 134; N. Y. Co. *v.* Memphis Co., 107 U. S. 205; Morgan *v.* Kansas Co., 21 Blatchf. 134; Doggett *v.* Hart, 5 Fla. 215; Mason *v.* Mason, 33 Ga. 435; Forrest *v.* O'Donnell, 42 Mich. 556; Western Co. *v.* Nolan, 48 N. Y. 513; Wetmore *v.* Porter, 92 N. Y. 76 (*semble*); Crosby *v.* Bowery Bank, 50 N. Y. Sup'r Ct. 453; Phœbe *v.* Black, 76 N. Ca. 379.

But for some time the *cestui que trust* could proceed only against his trustee: Dhegetoft *v.* London Co., Mosely, 83, affirmed in 4 Bro. P. C. (Toml. ed.) 436; Fall *v.* Chambers, Mosely, 193; Motteux *v.* London Co., 1 Atk. 545, 547.

Now, however, the beneficiary is allowed, on the principle of avoiding multiplicity of actions, to join the obligor as a defendant with the recusant trustee: Fletcher *v.* Fletcher, 4 Hare, 67; Gandy *v.* Gandy, 30 Ch. Div. 57; Owens *v.* Ohio Co., 20 Fed. Rep. 10; Wright *v.* Mack, 95 Ind. 332; Hale *v.* Nashua Co., 60 N. H. 333; De Kay *v.* Hackensack Co., 38 N. J. Eq. 158; Davies *v.* N. Y. Co., 41 Hun, 492. See, further, the analogous cases of proceedings in equity against an executor and a debtor of the testator: Barker *v.* Birch, 1 DeG. & Sm. 376; or against a guardian and a debtor to the ward's estate: Mesmer *v.* Jenkins, 61 Cal. 151; Frost *v.* Libby, 79 Me. 56. — ED.

THOMASSEN, GUARDIAN, *v.* VAN WYNGAARDEN ET AL.

IN THE SUPREME COURT, IOWA, APRIL TERM, 1885.

[*Reported in* 65 *Iowa Reports,* 687.]

ACTION in equity to foreclose two mortgages. From the decree the plaintiff appeals.

Bosquet & Earle, for appellants.

Gesman & Prouty and *J. M. St. John*, for appellee.

SEEVERS, J. The defendant Wyngaarden executed the following promissory note:

"$1,400. Pella, Iowa, November 11, 1878.

"Six years after date, for value received, I promise to pay to Jantie Van Wyngaarden, in trust for Gertruda Geradina Thomassen, Jana Thomassen, Wilhemina Thomassen, Johannes Thomassen, and Jan Thomassen, heirs of Maarke Thomassen, deceased, or order, the sum of fourteen hundred dollars, payable at the First National Bank, Pella, Iowa, with interest, payable annually, at the rate of six per cent per annum from date until paid. Interest when due to become principal and draw ten per cent, and an attorney fee of ten per cent if suit is commenced on this note."

The mortgages were given to Jantie Van Wyngaarden in trust for the beneficiaries named in the note. It was pleaded as a defence that the interest up to that time had been paid. The mortgages provided that, in the event the interest was not paid as therein provided, then the whole debt became due. The beneficiaries are grandchildren of Jantie Van Wyngaarden, and are minors, and the plaintiff is their guardian. This suit was commenced in March, 1882, and the court found that there was nothing due at that time.

I. Counsel for the appellant insist that there is no sufficient evidence showing that the interest due on the note up to January, 1882, has been paid.

The defendants introduced in evidence a receipt in the following words, and proved that it was executed by the trustee:

"Pella, Iowa, December 22, 1880.

"Received of Jan Van Wyngaarden the sum of one hundred and forty-seven dollars, as interest on a certain note, secured by mortgage, to me given by the said Jan Van Wyngaarden in trust (for the beneficiaries above named); this being in full up to January 1, 1882.

"JANTIE VAN WYNGAARDEN."

Counsel for the plaintiff insist that the receipt is signed by the trustee as an individual, and therefore the beneficiaries are not bound thereby. But we think it fairly appears from the receipt itself that the money was received by the trustee as such. It was paid to and received by the person to whom it was payable by the terms of the note, and she will be charged as having received it in her capacity as trustee.

II. Counsel for the appellant insist that the trust created by the execution of the notes and mortgages is a simple or dry trust, and that the trustee in such a trust does not have the power to manage and dispose of the trust estate, and therefore the beneficiaries are not bound by what the trustee did. A simple or dry trust is defined to be one "where property is vested in one person in trust for another, and the nature of the trust, not being prescribed by the donor, is left to the construction of the law." Perry, Trusts, § 520. "There can be but few of these dry trusts; for, when there is no control, and no duty to be performed by the trustee, it becomes a simple use, which the statute of uses executes in the *cestui que trust*, and he thus unites both the legal and beneficial estate in himself."

The trust under consideration is materially different; for it is so far declared as to cast on the trustee a duty for the performance of which she will be held accountable. It is made the duty of the trustee to receive and collect the interest and the principal when it becomes due. The legal title to the note and mortgages is vested in the trustee. It is her duty to preserve and protect the interest of the beneficiaries. But, in the absence of fraud or collusion, the trustee could satisfy the mortgages and acknowledge satisfaction of the debt, which would be binding on the beneficiaries. It is said that any one dealing with the trustee must see that money paid in the discharge of the trust was properly appropriated; but we do not think this is so, for the simple reason that the trustee was the legal owner of the note, and authorized to receive payment of both the principal and interest. An administrator in one sense is a trustee for the estate he represents; and yet he is the legal owner of the notes and mortgages belonging thereto. A person making him a payment is not bound to see that the money is properly accounted for.

The rule, it seems to us, should be the same in the case under consideration. *The decree of the Circuit Court must be affirmed.*[1]

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[1] Sayre *v.* Weil (Ala. 1891), 10 S. R. 546 (*semble*); Munnderlyn *v.* Augusta Bank (Ga. 1891), 14 S. E. R. 554; Sherburne *v.* Goodwin, 44 N. H. 271; Boone *v.* Bank, 84 N. Y. 83, 21 Hun, 235 *Accord.*

Compare C. E. Bank *v.* F. N. Bank, 118 N. Y. 443. — ED.

SECTION V.

A Trust distinguished from an Executorship.

JAMES SCOTT AND OTHERS, APPELLANTS, v. SAMUEL JONES, SURVIVING ASSIGNEE, RESPONDENT.

IN THE HOUSE OF LORDS, MARCH 17, 24, 1835. — AUGUST 16, 1838.

[*Reported in* 4 *Clark & Finnelly,* 382.]

LORD LYNDHURST.[1] In a case of Scott v. Jones, which was heard a considerable time back, the judgment has, from accidental causes, been hitherto postponed. The facts of the case are extremely simple, and the question resolves itself into a mere question of law. It appears that, in 1815, Messrs. Evans and Jelf carried on business in partnership, as bankers, at Gloucester. In that year they became bankrupts, and their effects were assigned under their commission to assignees in the usual manner. Mr. R. Donovan had a running account with the bank, and there was a balance against him at the time of the bankruptcy to the amount of £262 4*s.* 3*d.* R. Donovan in the same year made his will, and by that will he disposed of the personal estate he possessed to trustees, for the payment of his debts; and he also devised to the same trustees what he considered to be his real estate at Tibberton Court; and he directed that, in the event of the personal estate not being sufficient to discharge the debts, a sum should be added for that purpose, to be raised by the sale or mortgage of the real estate of Tibberton. He died in the following year; one of the trustees alone proved the will, the other renounced. The trustee who proved the will administered part of the assets, and soon afterwards died, and the ultimate administration *de bonis non* was granted to one of the appellants, the daughter of R. Donovan. She shortly afterwards put an advertisement into the Gloucester paper, directing all persons who either had or conceived themselves to have any claim against the estate of her father, to send in an account of those claims to Messrs. Bubb, who were attorneys carrying on business at Cheltenham. In consequence of this advertisement, the assignees of the bankrupt sent in their demand, amounting to the sum of £260, against his estate. It appears that no notice was taken of this demand, in consequence of which the assignees commenced an action against Mrs. Scott, one of the appellants, and her husband. To this action the defendants pleaded the Statute of Limitations, and there were then no further proceedings taken in the action. There cannot be a doubt that that was because the Statute of Limitations was a sufficient

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[1] The statement of facts and arguments of counsel are omitted. — ED.

bar to the action, there being nothing whatever to take the case out of the statute, this advertisement clearly not being attended with that effect. In consequence of that, the present bill was filed, demanding an application of the trust funds in payment of the debts of the testator. The defendants, in their answer to this suit, insist on the Statute of Limitations, and the only question is, whether the trust was of such a nature as to prevent the setting up of such a defence. I have mentioned that the testator considered the estate at Tibberton to be real estate. When sold, however, it turned out to be mere leasehold, and to form part of the personalty. Had it been real estate, in that case the plaintiff would have been entitled to recover; but though part of the personalty, it is said to be taken subject to the trust, and the question is, whether a trust of this description declared of the personal estate prevents the Statute of Limitations being set up by way of defence, and I am clearly of opinion that it does not, because it does not at all vary the legal liability of the parties, or make any difference with respect to the effect and operation of the statute itself. The executors take the estate subject to the claim of the creditors: they are, in point of law, the trustees for the creditors; the trust is a legal trust, and there is nothing whatever added to their legal liabilities from the mere circumstance of the testator himself declaring in express terms that the estate shall be subject to the payment of his debts. I conceive, therefore, that the circumstance of there being an express trust in this case does not make any alteration with respect to the question. And if in ordinary circumstances, as to personalty, where there was a mere legal liability, the existence of a mere legal trust would not have been an answer to a plea of the Statute of Limitations; so I conceive that in the present case no alteration can take place, from the existence of an express trust, and that that trust cannot, under these circumstances, be considered as an answer to the statute.[1] I am of opinion, therefore, that the judgment of the Master of the Rolls was the correct judgment, and that the judgment of the late Lord Chancellor, reversing it, ought to be set aside. As, however, two learned judges have entertained different opinions on this point, the decree of the Court below must be set aside, without costs. *Judgment reversed without costs.*

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[1] Freake *v.* Cranefeldt, 3 M. & Cr. 499; Evans *v.* Tweedy, 1 Beav. 55; Cadbury *v.* Smith, 9 Eq. 37; *Re* Hepburn, 14 Q. B. D. 394; *Re* Stephens, 43 Ch. D. 39; Hines *v.* Spruill, 2 Dev. & B. Eq. 93; Man *v.* Warner, 4 Whart. 455. In this country it would seem that a general charge by a testator upon his lands for the payment of debts and legacies would not affect the running of the Statute of Limitations, since the lands would be chargeable in any event. Carrington *v.* Manning, 13 Ala. 611; Steele *v.* Steele, 64 Ala. 438, 458; Starke *v.* Wilson, 65 Ala. 576; Martin *v.* Gage, 9 N. Y. 398; Trinity Church *v.* Watson, 50 Pa. 518 (explaining Alexander *v.* McMurry, 8 Watts, 504). But see Templeton *v.* Tompkins, 45 Miss. 424; Abbay *v.* Hill, 64 Miss. 340. — ED.

In re SMITH. HENDERSON-ROE *v.* HITCHINS.

In the Chancery Division, July 2, 1889.

[*Reported in* 42 *Chancery Division*, 302.]

Originating Summons to determine certain questions arising upon the will of Caroline Smith, who died on the 14th of December, 1888.

[illegible]

The testatrix, by her will, dated the 26th of July, 1888, appointed the plaintiff to be her executor, and directed that all her just debts and funeral and testamentary expenses should be paid as soon as conveniently might be after her decease. After bequeathing some small pecuniary legacies, and five legacies of £1,000 each, the will continued: "I leave the residue of my money (including the £750 settled on my brother, Charles H. Smith, at his death) to my cousin Dorothy Hitchins."

At the time of the death of the testatrix her personal estate consisted of about £1,200. She had no real estate.

The summons was issued by the executor, as plaintiff, against Dorothy Hitchins (who was an infant), and two sisters of the testatrix, as defendants. It asked the determination (*inter alia*) of the question whether the plaintiff was at liberty to pay the whole, or any and what part, of the income of the property to which Dorothy Hitchins should be held to be entitled under the will to her father, under the provisions of section 43 of the Conveyancing Act, 1881, which permitted a trustee for an infant to pay the income of the trust property, at his discretion, to the infant's parent, or otherwise apply it for the infant's maintenance, education, or benefit.[1]

C. Browne, for the infant.

G. Curtis Price, for the sisters of the testatrix.

North, J. I think the point is clear. The testatrix, after directing the payment of her debts and funeral and testamentary expenses, and bequeathing some pecuniary legacies, left "the residue of her money" to an infant. She also bequeathed some specific legacies. It is the duty of the executor to clear the estate, — to pay the debts, funeral and testamentary expenses, and the pecuniary legacies, and to hand over the assets specifically bequeathed to the specific legatees. When all this has been done a balance will be left in the executor's hands, and I think it is plain that this balance will be held by him in trust for the infant within the meaning of section 43. In Phillipo *v.* Munnings[2] the question arose, whether a suit against the executor of an executor to recover a sum of money which the original testator had bequeathed to his executor upon certain trusts, the ultimate trust being for John

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[1] The statement of the case has been abridged. — Ed.

[2] 2 My. & Cr. 309.

Buscall, who was dead intestate, the plaintiffs being his next of kin, was " a suit to recover a legacy" within the meaning of the Statute of Limitations, 3 & 4 Will. IV. c. 27. The defendant's testator had set apart the sum of £400 to answer the legacy. Lord Cottenham held that the suit was not a suit to recover a legacy. He said:[1] "The whole fallacy of the defendant's argument consists in treating this suit as a suit for a legacy. Now, the fund ceased to bear the character of a legacy, as soon as it assumed the character of a trust fund. Suppose the fund had been given by the will to anybody else as a trustee, and not to the executor; it would then be clearly the case of a breach of trust."

Again, in Dix *v.* Burford[2] executors had assented to a specific bequest of £400 (which was secured by a conditional surrender of copyholds which had become absolute) to them upon certain trusts. The executors did not procure themselves to be admitted, and one of them alone received the money and released the estate and misapplied the money. It was held that the co-executor had become a trustee, and was liable to make good the money. Lord Romilly, M. R., said:[3] "The first question here is, whether the relation of trustee and *cestui que trust* existed? There is a specific legacy of this mortgage for £400, and a bequest of the residue to the executors. The moment the executors assented to the bequest, they became trustees for their *cestuis que trustent*, the £400 then ceased to be part of the testator's assets, and it became a trust fund for the benefit of the plaintiff for life, and afterwards for his children, and the executors became mere trustees for them of that fund."

In my opinion, it makes no difference for this purpose whether a pecuniary legacy payable out of the estate is given to an infant, or the residue of the testator's estate is given to an infant, so soon as that residue is ascertained. I might refer to many other cases, but I think those two are sufficient to show what the clearly settled rule of law is. In my opinion, the residue of the money in the hands of the executor, after satisfying all the previous trusts of the will, is property held by the executor in trust for the infant, within the meaning of section 43.[4]

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[1] 2 My. & Cr. 314. [2] 19 Beav. 409. [3] 19 Beav. 412.

[4] A bequest to an executor upon trust to invest and pay the income to another is not a legacy within 9 & 10 Vict. c. 95, s. 65, giving the county courts jurisdiction over legacies. Hewston *v.* Phillips, 11 Ex. 699. Alderson, B. said in this case, p. 702: "It is no part of the ordinary duty of an executor to do what this trustee is required to do; for, inasmuch as the *cestuis que trust* are infants, he is to invest the money during their minority. . . . That is no part of the duty of an executor; and therefore this is the case of a real trust."

Conversely, a legacy is not beyond the reach of a creditor's bill as a "trust" proceeding from a third person. Bacon *v.* Bonham, 27 N. J. Eq. 209.

It is not always easy to determine whether, in a given case, an executor has ceased to hold a fund as executor, and assumed the attitude of a trustee. But the legal difference between the two relations is clearly defined and has been frequently illustrated, E. g., if the executor has become a trustee, (1) the beneficiary has no further claim upon the general assets of the deceased. He must look solely to the specific *res* ap-

DRAKE AND WIFE *v.* PRICE, SURVIVOR OF ROBINSON.

IN THE COURT OF APPEALS, NEW YORK, SEPTEMBER, 1851.

[*Reported in* 5 *New York Reports*, 430.]

FOOT, J.[1] delivered the opinion of the Court.

The material question in this cause is, whether the appellant and his deceased co-executor held the funds as executors or as trustees, or, in other words, whether, as executors, they had paid it over to themselves, as trustees, and held it in the latter character.

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propriated to the trust: Wilmott *v.* Jenkins, 1 Beav. 401 (*semble*); Brougham *v.* Poulett, 19 Beav. 119; Brown *v.* Kelsey, 2 Cush. 243, 248; Hubbard *v.* Lloyd, 6 Cush. 522; Miller *v.* Congdon, 14 Gray, 114 (*semble*). (2) The beneficiary's remedy is in equity, instead of the Probate Court: Parsons *v.* Lyman, 32 Conn. 566, 5 Blatchf. 170, s. c.; Worden *v.* Kerr (Michigan, 1892), 51 N. W. R. 937; Poole *v.* Brown, 12 S. Ca. 556. (3) The beneficiary has a claim, in case of failure to invest, of what might have been realized: Burchell *v.* Bradford, 6 Mad. 235 (*semble*). (4) If there are several executors and trustees, one trustee cannot act for all, where one executor might so act: Ham *v.* Ham, 58 N. H. 70. (5) One trustee may be liable for the default of a co-trustee when an executor would not have to answer for default of a co-executor; Dix *v.* Burford, 19 Beav. 409. (6) Beneficiary, as plaintiff, may be a witness in a proceeding against the trustee, when he could not testify in a proceeding against the executor as the representative of the deceased: Myers *v.* Reinstein, 67 Cal. 89. (7) Statute of Limitations which bars a claim for a legacy has no bearing on the claim against the trustee: Phillipo *v.* Munnings, 2 M. & Cr. 309; Tyson *v.* Jackson, 30 Beav. 384; *Re* Rowe, 58 L. J. Ch. 703; *Re* Davis, '91, 3 Ch. 119 (*semble*); *Re* Swain, '91, 3 Ch. 233; Hartford *v.* Power, 2 Ir. R. Eq. 204; O'Reilly *v.* Walsh, 6 Ir. R. Eq. 555. (8) The beneficiary, as in other cases of trusts, may, to prevent a failure of the trust, secure the appointment of a new trustee: *Ex parte* Dover, 5 Sim. 500; *Ex parte* Wilkinson, 3 Mont. & A. 145. (9) It seems clear that after the executor has become a trustee the sureties on the executor's bond cannot be charged for subsequent acts or omissions of the trustee: Perkins *v.* Lewis, 41 Ala. 662 (*semble*); Hinds *v.* Hinds, 85 Ind. 312; State *v.* Anthony, 30 Mo. Ap. 625; see also Ruffin *v.* Harrison, 81 N. Ca. 208. But in some jurisdictions, notably in Massachusetts, the sureties on the executor's bond continue liable, even though the regular executorial duties are all performed, until the executor has given a new bond as trustee: Groton *v.* Ruggles, 17 Me. 137 (*semble*); Knight *v.* Loomis, 30 Me. 204 (*semble*); Hall *v.* Cushing, 9 Pick. 395; Ellis *v.* Ellis, 12 Pick. 178, 181; Towne *v.* Ammidown, 20 Pick. 535; Newcomb *v.* Williams, 9 Met. 525; Conkey *v.* Dickinson, 13 Met. 51; Prior *v.* Talbot, 10 Cush. 1; Miller *v.* Congdon, 14 Gray, 114; Richardson *v.* Morrill, 146 Mass. 76; Felton *v.* Sawyer, 41 N. H. 202 (but see Leavitt *v.* Wooster, 14 N. H. 550); see also State *v.* Nichols, 10 Gill & J. 27; Almond *v.* Mason, 9 Grat. 700. And the court will permit a new bond to be given only when special reasons of convenience require it. The application of the executor to substitute a bond as trustee in place of his bond as executor was denied in Dorr *v.* Wainwright, 13 Pick. 328, and the beneficiary was equally unsuccessful in Holbrook *v.* Harrington, 16 Gray, 102.

In other jurisdictions where the will directed an investment of personalty by the executor, the sureties on the executor's bond were held until the investment was made. Perkins *v.* Moore, 16 Ala. 9; Cranson *v.* Wilson, 71 Mich. 356; Cluff *v.* Day, 124 N. Y. 195; Probate Court *v.* Angell, 14 R. I. 495. — ED.

[1] The statement of facts is omitted, being sufficiently indicated in the opinion of Paige, J. — ED.

The same question arose on a similar clause in a will in the case of Valentine *v.* Valentine,[1] and Chancellor Walworth decided that the executors held the funds in their character of executors, and not as trustees. His decision appears to me to be sound, and in accordance with the provisions of the will.

Holding the fund, and receiving and paying over the interest, as executors, the appellant and his co-executors are clearly entitled to only one per cent on the interest received and paid.

PAIGE, J. (*dissenting*). The office of an executor is, (1) to take possession of all the goods and chattels, and other assets of the testator; (2) to collect the outstanding debts and sell the goods and chattels so far as is necessary to the payment of the debts and legacies; (3) to pay the debts and legacies, and under the order of the surrogate (4) to distribute the surplus to the widow and children or next of kin of the deceased. These acts embrace all the duties which appropriately belong to the executorial office. If any other duty is imposed upon the executor, or any power conferred, not appertaining to the duties above enumerated, a trust or trust power is created, and the executor becomes a trustee, or the donee of a trust power. And such powers are conferred, and such duties imposed upon him, not as incidents to his office of executor, but as belonging to an entirely distinct character, — that of trustee. And in all such cases the trust and executorship are distinguishable and separate. The allegations of the complaint make out a case of trust. The defendants, who were executors, were directed in the will of Gilbert Hunter to invest $5,000, as the share of the plaintiff, Julia Drake, and to keep the same invested during her life, and to secure the interest and pay the same over annually to her during her life, and on her decease to divide the principal among her lawful heirs. The defendants, in accordance with the direction of the will, invested the $5,000, and have annually paid over to her the interest, deducting therefrom five per cent commissions. This is not like the case of Valentine *v.* Valentine.[1] In that case the trust had not been assumed by the executors by an investment of the trust moneys, and the consequent separation from the moneys held by the defendants in their character of executors. Here the separation was made. The share of the plaintiff Julia Drake was taken out of the mass of the moneys belonging to the estate of the testator, and invested as a separate trust fund for the use and benefit of the *cestui que trust.* The payment of the interest annually on the sum so invested to the plaintiff Julia Drake is equivalent to an annual accounting under the 154th rule of the late Court of Chancery, and entitled the defendants to full commissions on the sum so received, as interest, and paid over each year, without regard to the aggregate amount of the previous receipts and disbursements by them, either as executors or trustees. (6 Paige, 216; 7 Paige, 266; 2 Paige, 287;

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[1] 2 Barb. Ch. 430.

9 Paige, 467.) The question whether the defendants would be entitled to double commissions for receiving and paying out the principal sum of $5,000, does not arise in this case.[1] There was no actual payment to the defendants of the $5,000 as trustees, the money being already in their hands as executors. And there will be no actual payment out, of the $5,000, until the death of Julia Drake.

The Revised Statutes allow executors full commissions only when moneys are both received and paid out. And under the late Chancellor's decision, one half commissions are to be allowed for receiving and one half for paying out. (7 Paige, 267.) No commissions can be allowed on either the investment or the reinvestment of trust moneys, or on the collection of moneys so invested or reinvested. (7 Paige, 265.)

I am of opinion that the judgment of the Supreme Court should be reversed. *Judgment affirmed.*[2]

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[1] Double commissions are not allowable when the executor is also trustee. Valentine *v.* Valentine, 2 Barb. Ch. 430.

[2] Lansing *v.* Lansing, 45 Barb. 182 *Accord.* Miller *v.* Congdon, 14 Gray, 114 (*semble*); Westerfield *v.* Westerfield, 1 Bradf. 198 *Contra.* — Ed.

A trustee is to be distinguished from a liquidator of a company: Knowles *v.* Scott, '91, 1 Ch. 717; — and from a guardian: Fox *v.* Minor, 32 Cal. 111; Anderson *v.* Cameron, Morris, Iowa, 437; Brooks *v.* Brooks, 11 Cush. 18. — Ed.

SECTION VI.

The Language necessary to the Creation of a Trust.

PALMER *v.* SCHRIBB.

IN CHANCERY, BEFORE LORD HARCOURT, C., ——, 1713.

[*Reported in* 2 *Equity Cases Abridged*, 291, *placitum* 9.]

J. S. devises the residue of his estate to his wife, and desires her to give all her estate at her death to his and her relations. *Quære*, If this does amount to a devise on a trust in the wife for all the estate which the husband gave her by his will. HARCOURT, C. thought these words too general to amount to a devise over of his estate after the death of the wife; nor can it be taken as a trust, because the words extend to all the estate which she shall be possessed of at the time of her death, which the husband has not any power over, and therefore it must be taken over as a recommendation, and not as a devise or trust.[1] But if the testator had desired his wife by his will to give at her death all the estate which he had devised to her, to his and her relations, there the estate devised to her ought to go after her death to his and her relations, according to the statute of distributions.

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Bill dismissed.

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[1] Anon., 2 Eq. Ab. 291, pl. 8 (Bequest to a wife: "I desire and request my said wife to give all her estate which she shall have at the time of her death to her and my nearest relations equally amongst them").

Eade *v.* Eade, 5 Mad. 118 (Bequest to a wife, "requesting that she will at her death leave £200 to each of the Miss Nortons, and leave the remainder of her property to my nephews G. and W. in such proportions as she thinks proper").

Lechmere *v.* Lavie, 2 M. & K. 197 (Bequest to two eldest daughters: "If they die single, of course they will leave what they have amongst their brothers and sisters, or their children").

Hood *v.* Oglander, 34 Beav. 513 (Devise to a son: "And it was his anxious desire that he would so settle and devise the same, . . . and also the manors, messuages, lands, and hereditaments to which he was or might become entitled, . . . that the same . . . might continue in the name of Oglander").

Parnall *v.* Parnall, 9 Ch. D. 96 (Bequest of everything to a wife: "It is my wish that whatever property my wife might possess at her death be equally divided between my children").

Hopkins *v.* Glunt, 111 Pa. 287 (Bequest of everything to a wife forever: "My further request is that at the death of my wife she will so divide what she may have among our daughters' children, share and share alike").

HARDING *v.* GLYN.

IN CHANCERY, BEFORE HON. JOHN VERNEY, M. R., JUNE 7, 1739.

[*Reported in* 1 *Atkyns*, 469.]

NICHOLAS HARDING in 1701 made his will, and thereby gave "to Elizabeth, his wife, all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing-apparel, but did desire her at or before her death to give such leases, house, furniture, goods and chattels, plate and jewels, unto and amongst such of his own relations as she should think most deserving and approve of," and made his wife executrix, and died the 23d of January, 1736, without issue.

Elizabeth, his widow, made her will on the 12th of June, 1737, "and thereby gave all her estate, right, title, and interest to Henry Swindell in the house in Hatton Garden, which her husband had bequeathed to her in manner aforesaid; and after giving several legacies, bequeathed the residue of her personal estate to the defendant Glyn and two other persons, and made them executors," and soon after died, without having given at or before her death the goods in the said house, or without having disposed of any of her husband's jewels, to his relations.

The plaintiffs insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she has not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestates' effects.

MASTER OF THE ROLLS. The first question is, If this is vested absolutely in the wife? And the second, If it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life; there are no technical words in a will, but the manifest intent of the testator is to take place, and the words "willing" or "desiring" have been frequently construed to amount to a trust, Eacles *et ux.* *v.* England *et ux.*;[1] and the only doubt arises upon the persons who are to take after her.

Where the uncertainty is such that it is impossible for the court to determine what persons are meant, it is very strong for the court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word "relations" is a legal description, and this is a devise to such relations, and operates as a trust in the wife, by way of power of naming and apportioning, and her non-performance of the power shall not make the devise void, but the power shall devolve on the court; and though this is not to pass by virtue of the statute of distributions, yet that is a good rule for the court to go by. And therefore I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next of kin at her death; and do order that so much of the said household goods in Hatton Garden, and other personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding, his wife, which she did not dispose of according to the power given her thereby, in case the same remains in specie, or the value thereof, be delivered to the next of kin of the said testator Nicholas Harding, to be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding.[1]

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[1] 2 Vern. 466.

HARLAND v. TRIGG.

IN CHANCERY, BEFORE LORD THURLOW, C., ——, 1782.

[*Reported in* 1 *Brown's Chancery Cases*, 142.]

RICHARD HARLAND, being seised in fee of the manor of Sutton, in the county of York, and having four sons, Philip, John, Richard (the plaintiff), and Francis, by his will in 1747 devised the said manor (with other lands) to Philip, the eldest son, for life, with remainder to his first and other sons in tail male, remainder to John, the second son, for life, remainder to the plaintiff for life, remainder to Richard for life, with like remainders to their several first and other sons, and with further remainders over. Richard, the father, died in 1750; Philip entered, and, being himself also possessed of leasehold estates in Sutton, some for lives and others for years, by his will, made in the year 1764, gave his leasehold estate for lives to the trustees of his father's will, to the

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[1] In Brown v. Higgs, 8 Ves., Lord Eldon said, p. 570: "It is perfectly clear that, where there is a mere power of disposing, and that power is not executed, this court cannot execute it. It is equally clear that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this court will execute the trust. One question, therefore, is, whether John Brown had a trust to execute, or a power, and a mere power. But there are not only a mere trust and a mere power, but there is also known to this court a power which the party to whom it is given is intrusted and required to execute; and with regard to that species of power the court consider it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the court will, to a certain extent, discharge the duty in his room and place. Upon that principle, the case of Harding v. Glyn proceeded. But that case cannot be got rid of by saying it is a singular case, and that it is difficult to reconcile all subsequent cases with it; for that case has been treated as a clear authority, probably for the whole, certainly by my own experience for a very considerable part, of the time elapsed since that judgment was pronounced." See *infra*, p. 000.

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same uses to which the lands devised by the father's will were limited, so far as by law he could; and then followed this clause: "And all other my leasehold estates in the parish or township of Sutton I give to my brother John Harland, forever, hoping he will continue them in the family." Philip died in 1766. John entered on the estate, and died in 1772, having made his will and given these leasehold estates to his widow, whom he made executrix, and who since married the defendant Trigg. Richard, the third son, filed this bill, insisting the devise in Philip's will subjected these estates to the same uses as those declared by the father's will; that he was, therefore, entitled to the next estate in remainder, and praying that it might be so declared.

Mr. Attorney General, Mr. Madocks, Mr. Ainge, and *Mr. Sprange r* contended that John had an estate only for life.[1]

LORD CHANCELLOR. I have no doubt but a requisition made with a clear object will amount to a trust. In the case of the Duchess of Buckingham's will, the words were very gentle, but had a distinct object. But where the words are not clear as to their object, they cannot raise a trust. Where this testator had a leasehold estate, which he meant should go to the family, he has used apt words; therefore, where he has not used such words, he had a different intent.

Mr. Mansfield and *Mr. Lloyd*, for the defendant.

LORD CHANCELLOR. I think every will ought to be construed according to the intent of the testator, where it can be collected. In order to make a title, the plaintiff states that the father had settled his estates in strict settlement, and insists that I shall understand this devise as giving the leasehold estates to the same uses, as nearly as their nature will admit. The testator gives other estates to trustees, subject to charges, to the uses in that settlement; he therefore understood how to make his estates liable to those uses, and intended something different here. The argument is, that there will be part of the will ineffectual, the words, "hoping that he will continue them in the family": the answer is, that the words are precatory, not imperative. Another argument made use of is, that, if this was furniture, the devise would carry it: but, if so, it would be on this ground, that he recollected that the house would pass, and meant the furniture should remain attached to it under all its limitations. That case has peculiarities that do not occur here. It would be a great deal too much to tie this up as a strict settlement. I had a doubt whether the family could not claim some interest in the subject, but when I come to consider, I take the rule of law to be this; that two things must concur to constitute these devises, — the terms and the object. Hoping is in contradistinction to a direct devise; but whenever there are annexed to such words precise and direct objects, the law has collected the whole together, and held the words sufficient to raise a trust: but then the objects must be distinct; where there is a choice, it must be in the power of the devisee to dispose of it either way. If he had sold these leaseholds, the family could not have taken them from the vendee, or if he had given them to any one part of the family, the others could have no remedy. The will does not import a devise, as the words do not clearly demonstrate an object. I am therefore of opinion that the bill must be dismissed.

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[1] The arguments of counsel are omitted. — ED.

WYNNE *v.* HAWKINS.

In Chancery, before Lord Thurlow, C., ——, 1782.

[*Reported in* 1 *Brown's Chancery Cases*, 179.]

The plaintiff is the only surviving child of William Wynne, who was the only son of John Wynne. John Wynne, by will dated in 1773, gave some pecuniary legacies, and then went on as follows: "And as I have lately received the melancholy account of the death of my dear son, William Wynne, at Bengal, who has left a widow and two small children, and I am informed he died worth five times the fortune I shall leave behind me, which will be a handsome provision; and as I shall leave behind me, over and above the said legacies, only sufficient for a decent maintenance for my loving wife, Mary Wynne, by whose prudence and economy I have saved the greatest part of the fortune I shall die possessed of, not doubting but that she will dispose of what shall be left at her death to our two grandchildren; all the rest and residue of my personal estate, goods, chattels, moneys in the stocks, plate, jewels, watches, and household furniture, and whatever else I shall be possessed of at the time of my decease, I give and bequeath to my loving wife Mary, hereby constituting and appointing her sole executrix." The testator died in September, 1775. The wife died intestate, July, 1781, and this bill was filed by the surviving grandchild, against her personal representative, for an account of, and to be paid such part of the estate of the grandfather as remained undisposed of by the wife during her life. And the question was, whether these words made an absolute devise to the wife, or operated as a remainder over.

Mr. Mansfield and *Mr. Hardinge*, for the plaintiffs.

Mr. Attorney General, for the defendants.[1]

Lord Chancellor. If a bill had been filed in the lifetime of the wife, could I have ordered this money to be laid out, and that she should receive the interest for her life, and then it should go over? These are equivocal words, the intent of which is to be gathered from the context. If the intention is clear what was to be given, and to whom, I should think the words "not doubting" would be strong enough. But where, in point of context, it is uncertain what property was to be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed; and, where that does not appear, the scale leans to the presumption that he meant to give the whole to the first taker. Here he looked upon the provision made by the father of the grandchildren as an ample provision, and meant this fortune to pass through the pleasure of his wife, leaving it to her to use what she pleased, and consequently to make the residue such as she chose. If he had meant imperatively, he might easily have used such words as would have effected his intention; but it is impossible, upon any rule of construction, to make these words an order upon her to pass the property over.

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[1] The arguments of counsel are omitted. — Ed.

Bill dismissed.[1]

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[1] There was no trust in the following cases. Bland *v.* Bland, 2 Cox, 349; Prec. Ch. (ed. Finch), 201 n.; 2 Brown C. C. 43 (cited), s. c. (Devise to a husband "earnestly requesting that, in case he should die without issue, he would dispose of the estate, or of so much thereof as he should die seised of, so that the estate might be enjoyed by her daughters").

Pushman *v.* Filliker, 3 Ves. Jr. 7 (Residue to wife, "desiring her, . . . on her decease, to dispose of what shall be left among my children in such manner as she shall judge most proper").

Wilson *v.* Major, 11 Ves. 205 (Residue to a wife, "upon full trust and confidence in her justice and equity that at her decease she would make a proper distribution of what effects might be left, in money, goods, or otherwise, to his children").

Cowman *v.* Harrison, 10 Hare, 234 (Bequest of income to a wife, "particularly recommending, desiring, and directing her at her decease, by will or otherwise, to divide" the savings therefrom "amongst all his children in equal shares").

Mills *v.* Newberry, 112 Ill. 124 (Bequest of everything to A., "upon the express condition, however, that she devise, by will to be executed before receiving the bequest, so much thereof as shall remain undisposed of or unspent at the time of her decease to such charitable institution in Chicago as she may select").

Rona *v.* Meier, 47 Iowa, 572 (Bequest of everything to a wife, "with full power to dispose of the same. . . . It is my desire that, at the death of my said wife, whatever property may be left shall thus be disposed of, and request of my wife that she will and provide that the property so received from me shall be devised at her death as follows." Full directions follow).

Williams *v.* Worthington, 49 Md. 572 (Residue to a wife: "It is my request and desire that my said wife should by last will and testament devise and bequeath all of said property at her death remaining in her possession to my friend B. W. and to E. W., . . . share and share alike").

Davis *v.* Mailey, 134 Mass. 588 (Residue to a wife, "to her sole use, benefit, and disposal . . .; and whatever may be left of my estate, if any, she may by will or otherwise give to those of my heirs that she may think best, she knowing my mind upon that subject. I am willing to leave the matter entirely with her, feeling satisfied that she will do as I have requested her to in the matter").

In the case last cited the court said, through Field, J.: "This construction renders it unnecessary to determine whether, if the recommendation were intended to bind the devisee, it would not be repugnant to the devise or void for uncertainty."

Second Church *v.* Disbrow, 52 Pa. 219 (Devise to a wife "to enjoy during her lifetime, or dispose of the same, as shall seem best unto her, and in doing so she shall possess all the rights and powers that I of right could do if I were living; but it is my wish and desire that my said wife will leave at the time of her death the property thus left to her by me, or any part that may be then remaining in her hand, for the benefit of young men that are unable to educate themselves," &c.).

If it is desired to give to one person the full enjoyment of certain property,

MALIM *v.* KEIGHLEY.

In Chancery, before Sir Richard Pepper Arden, M. R., June 7, 1794.

[*Reported in* 2 *Vesey, Jr.*, 333.]

Thomas Lowe, by his will, gave £1,000 stock in trust to pay the interest and dividends to his daughter Anne Malin for life, for her separate use, and after her decease the principal among her children; if no children, to sink into the residue. He gave £500 stock to Elizabeth Thompson, and a similar sum to Sarah Lowe, two other daughters; and declared trusts, in failure of which those sums should sink into the residue. Then he gave all the rest and residue of his estate and effects whatsoever and wheresoever in trust, as to one third for his daughter Lucy Rawlin, for her separate use for life; after her decease for her husband for life, and after his decease for the children; as to another third, for Elizabeth Thompson, for her separate use for life, and after her decease for her children, with a proviso that, if she should survive her husband, and marry again, she might, by writing under her hand and seal, executed before such marriage in the presence of two witnesses, direct the interest, &c. to be paid, after her decease, to such husband for life; as to the other third, for Sarah Lowe and her children in the same manner, and with a similar power in case of her marriage; and in case either of these daughters should

together with the power of alienation, and at the same time to secure to another the benefit of so much of the property as is not disposed of by the first donee, this desire may be accomplished by a gift to the one person for life, with a power of alienation, and a limitation of what remains at his death to the other. 1 Jarman, Wills (4th ed.), 362–364; Henderson *v.* Cross, 29 Beav. 216 (*semble*); Constable *v.* Bull, 3 DeG. & Sm. 411; *Re* Stringer's Estate, 6 Ch. D. 1; Bibbens *v.* Porter, 10 Ch. D. 733; *Re* Thomson's Estate, 13 Ch. D. 144, 14 Ch. Div. 263; *Re* Sheldon, 53 L. T. Rep. 527; Espinasse *v.* Luffingham, 3 Jo. & Lat. 186, 9 Ir. Eq. 129; Smith *v.* Bell, 6 Pet. 68; Funk *v.* Eggleston, 92 Ill. 515; John *v.* Bradbury, 97 Ind. 263; Hall *v.* Preble, 68 Me. 100; Hall *v.* Otis, 71 Me. 326; Taft *v.* Taft, 130 Mass. 461; Burleigh *v.* Clough, 52 N. H. 267; Terry *v.* Wiggin, 47 N. Y. 512; Cohen *v.* Cohen, 4 Redf. 48; Colt *v* Hazard, 10 Hun, 189; Crozier *v.* Bray, 120 N. Y. 366; Leggett *v.* Firth, 132 N. Y. 7; Hambright's App., 2 Grant, (Pa.) 320. But if property is given to one person in fee, i. e. as absolute owner, a limitation to another of what is undisposed of at the death of the absolute donee is void for repugnancy. For one of the incidents of absolute ownership is the right of the owner to suffer his property to descend to his heir or next of kin. Atty. Gen. *v.* Hall, Fitzg. 314; Sprange *v.* Barnard, 2 Bro. C. C. 585; Watkins *v.* Williams, 3 MacN. & G. 622; Perry *v.* Merritt, 18 Eq. 152; Henderson *v.* Cross, 29 Beav. 216; Shaw *v.* Ford, 7 Ch. D. 669; Howard *v.* Carusi, 109 U. S. 725; Case *v.* Dewire, 60 Iowa, 442; Halliday *v.* Stickler, 78 Iowa, 388; Combs *v.* Combs, 67 Md. 263; Kelly *v.* Meins, 135 Mass. 229; Joslin *v.* Rhodes, 150 Mass. 301; Weir *v.* Mich. Co., 44 Mich. 506; Hoxsey *v.* Hoxsey, 37 N. J. Eq. 21; McClellan *v.* Larcher, 45 N. J. Cas. 17; Campbell *v.* Beaumont, 91 N. Y. 464; Van Horn *v.* Campbell, 100 N. Y. 287; Jauretche *v.* Proctor, 48 Pa. 466; Cox *v.* Roger, 77 Pa. 160; Cole *v.* Cole, 79 Va. 251. — Ed.

leave no children, the share of such daughter was to go to the other two daughters in the same manner, as their respective funds.

"And in case the whole of the residue of my personal estate shall become vested in any one of my said daughters, then I do give and bequeath the same, after the expiration and determination of the several trusts before mentioned, unto such surviving daughter, her executors and administrators, hereby recommending it to such daughter to dispose of the same after her own death, and the determination of the several trusts aforesaid, unto and among the children of my said daughter Anne Malim and my nephew John Lowe, of Ferry Bridge, — desiring that his reputed daughter Amelia, though born before marriage, may be considered as one of his children."

The whole residue became vested in the testator's daughter Sarah, who married Keighley; and the question was whether, after her decease without issue and intestate, a trust arose for the children of Anne Malim and John Lowe.

Mr. Lloyd, for the children of Malim and Lowe, plaintiffs.

Mr. Graham and *Mr. Abbott*, for the defendant.[1]

MASTER OF THE ROLLS (SIR RICHARD PEPPER ARDEN). I think, with Lord Kenyon, that Cunliffe *v.* Cunliffe[2] is overruled; that he meant to say he differed from the Lords Commissioners, and that he should be of the same opinion if the word had been "recommend." The question is, whether there is any difference between "recommend" and "it is my dying request," — whether the former is not equal to the latter. If I was deciding upon the weight of the words, I rather think "recommend" is stronger than "desire." A great stress is laid upon the word "dying," but every request by will is a dying request. I will lay down the rule as broad as this :(wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it.) The word "recommend" proves desire, and does not prove discretion. If a testator shows his desire that a thing shall be done, unless there are plain, express words or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust. I will not criticise upon the words. "Recommend" is a request, and more. If I request a man to do anything, I recommend it; and *vice versa*. I do not know how to distinguish them; therefore declare that the residue of the personal estate upon the death of Sarah Keighley without issue, and intestate, became a trust for the children of Anne Malim and John Lowe, in equal shares and proportions.[3]

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[1] The arguments of counsel are omitted. — ED.

[2] Amb. 686.

[3] Affirmed by Lord Loughborough, 2 Ves. Jr. 529.

LAMBE *v.* EAMES.

IN CHANCERY, BEFORE SIR W. M. JAMES AND SIR G. MELLISH, L. JJ., MARCH 9, 10, 1871.

[*Reported in Law Reports*, 6 *Chancery Appeals*, 597.]

JOHN LAMBE, by his will, gave his freehold house in Cockspur Street, and all his estate, to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family." The testator died in 1851, leaving the widow and children. One of his sons had an illegitimate son, Henry Lambe, born in the lifetime of the testator, but after the date of his will.

The widow died in 1865, having by her will devised the freehold house in Cockspur Street to trustees upon trust for one of her daughters, Elizabeth Eames, but charged with an annuity for Henry Lambe.

Henry Lambe filed the bill in this suit to obtain payment of the annuity, which was disputed by Elizabeth Eames on the ground that the widow had only a power of disposition amongst the family, and that Henry Lambe, being illegitimate, could not take under that power.

The Vice Chancellor Malins decided that the devise to the widow was absolute, and that she had therefore power to devise to the plaintiff, as reported.[1]

The defendant Elizabeth Eames appealed.

Mr. Bristowe, Q. C., and *Mr. W. Barber*, for the appellant.[2]

Mr. Heath, for another defendant.

Mr. Cotton, Q. C., and *Mr. Warner*, for the plaintiff.

Mr. Bristowe, in reply.

SIR W. M. JAMES, L. J. In this case my opinion is that the decision of the Vice Chancellor is perfectly right. If this will had to be construed irrespective of any authority, the construction would, in my opinion, not be open to any reasonable doubt.

It is the will of a man who was in business as a shopkeeper, and was, when he made his will, in the prime of life, with a wife and young children, and it is to this effect. [His Lordship then read the will.] Now the question is, whether those words create any trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise.

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[1] 10 Eq. 267.

[2] The argument for the appellant, together with the concurring opinion of Mellish, L. J., is omitted. — ED.

The testator intended his wife to remain head of the family, and to do what was best for the family. If he had said, "I give the residue of my property to my three sons, each to take his share, to be at his disposition as he should think best, for the benefit of him and his family," — in such a case it would be clear that the testator did not mean to tie the property up, but to give a share to each son, believing that he would do the best for his family.

But it is said that we are bound by authority. The cases cited may, however, be distinguished. In this will there is, in the first place, an absolute gift, and we have to be satisfied that this gift is afterwards cut down. It was also argued that in some cases, as in Crockett *v.* Crockett,[1] the Court has decided there was some interest in the children, but did not declare what it was, leaving the matter to be dealt with after the death of the tenant for life.

It is possible that in this case there may be some obligation on the widow to do something for the benefit of the children; but, assuming that there is such an obligation, it cannot be extended to mean a trust for the widow for her life, and after her death for the children, in such shares as she may think fit to direct. That would be to enlarge the will in a way for which there is no foundation; but unless the will has that meaning, what trust is there? I cannot agree that she is to take what she likes, and that what she has not spent is to go at her death for the benefit of her children. In Crockett *v.* Crocket,[1] it was only decided that the children had some interest, and if the widow fairly satisfied that obligation, and gave them some interest, nothing more could be required.

Then this case was said to be like Godfrey *v.* Godfrey.[2] But there the Vice Chancellor decided that there was an interest, though he did not define what that interest was. [His Lordship then read and commented on the judgment in Godfrey *v.* Godfrey, and said that the *ratio decidendi* in that case was that there was a trust.] But it is impossible in this case to say that there was a trust. The testator clearly intended her to deal with the property as she pleased, and contemplated that she might risk it in his trade.

The other cases cited are merely illustrations of the same kind, and do not enable the court to escape from the difficulty of having to decide upon the meaning of the word "family." It seems to me impossible to put any restriction upon the meaning of that word, or to exclude any person who, in ordinary parlance, would be considered within the meaning. The word might include sons-in-law, or daughters-in-law, and many others. It is equally uncertain what the property is, because,

[1] 2 Ph. 553.

[2] 2 N. R. 16; 11 W. R. 554.

if she could spend any part for her own private purposes, then there might be nothing left for the trust.

It is impossible to execute such a trust in this court, and if the case stood alone I should say that no sufficient trust was declared by the will. But if there be any such obligation, I think it has been fairly discharged by the way in which she has made her will, — giving part for the benefit of one member of the family, and part to a natural son, whom she might reasonably think it her duty to benefit.

It appears to me that the decision of the Vice Chancellor is right, and that the appeal must be dismissed.

SIR G. MELLISH, L. J. I am of the same opinion.[1]

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[1] In the following cases it was held that the donee took beneficially, subject to an obligation in favor of a third person : —

Hamley *v.* Gilbert, Jac. 354 (Gift to A. upon trust to pay certain moneys to a niece, which moneys "should be laid out and expended by her, at her discretion, for or towards the education of her son, F. G. H., and that she should not at any time thereafter be liable and subject to account to her said son, or to any other person whatever, for," &c.).

Foley *v.* Parry, 2 M. & K. 138 ; 5 Sim. 138, s. c. (Residuary bequest to testator's wife for life, remainder to a grand-nephew, W. W. F. · "It is my particular wish and request that my dear wife and W. W., the grandfather of the said W. W. F., will superintend and take care of his education, so as to fit him for any respectable profession or employment").

Berkeley *v.* Swinburne, 6 Sim. 613 (Devise to trustees in trust for a sister's children, the trusts to vest upon the majority or marriage of each, the income to be paid to the sister (or guardian of the children) prior to the vesting, "to be applied in and towards the maintenance and education of such child or children respectively, or otherwise for their respective use and benefit").

Camden *v.* Benson, 4 L. J. Ch. N. S. 256 (Bequest of income to testator's wife during her life, "in support of herself and three children").

Woods *v.* Woods, 1 M. & Cr. 401 (Devise to a wife for the payment of debts, "all overflush to my wife, towards her support and her family, if any there be").

Hadow *v.* Hadow, 9 Sim. 438 (Devise to trustees upon trust to pay to testator's sons at twenty-one, and in the mean time to pay the income to "my said dear wife, J. H., to be by her applied, or, in case of her death, to be applied by my said trustees . . . for and towards the maintenance, education, and advancement in life of my said sons . . . in such manner as she or they shall think proper").

Gilbert *v.* Bennett, 10 Sim. 371 (Devise to trustees upon trust to pay the income "unto my said wife for the education and advancing in life of any children she may have borne by me, . . . and after her death the whole of the said property . . . to be divided equally . . . among my said children").

Page *v.* Way, 3 Beav. 20 (Settlement by F. J., upon trust to receive and pay income "unto or for the maintenance and support of the said F. J., his wife, and children ; or otherwise, if the trustees should so think proper, permit the same rents, &c. to be received by the said F. J. during the term of his natural life").

Wood *v.* Richardson, 4 Beav. 174 (Devise to a wife, "absolutely and at her own disposal, for the maintenance of herself and bringing up of my children").

Raikes *v.* Ward, 1 Hare, 445 (Bequest of entire personalty to a wife, "to the intent that she may dispose of the same for the benefit of herself and our children, in such manner as she shall deem most advantageous").

Leach *v.* Leach, 13 Sim. 304 (Bequest of leaseholds to J. O., upon trust to pay an annuity of £200 to testator's daughter E., the wife of T. L., for life, afterwards to T. L., "to enable him to maintain and educate all and every the child and children of the said E., and for their advancement in life until the youngest should attain twenty-one"; and in case of T. L.'s death, upon trust for J. O., "to apply the same in like manner as T. L. was thereby directed to do").

Longmore *v* Elcum, 2 Y. & C. C. C. 363 (Devise to A. in trust to permit testator's wife to receive the income "for her own use and benefit, and for the maintenance and education of my dear children so long as she, my said wife, shall continue my widow and unmarried").

Bowden *v.* Laing, 14 Sim. 113 (Bequest of income of certain property to testator's wife for life, "for the maintenance of herself and children").

Conolly *v.* Farrell, 8 Beav. 347 (Bequest to testator's wife for the use of his wife and daughter, subject to the trust "that his wife and daughter should live together, and that his wife shall take charge and see to the maintenance and support of his daughter during her minority, with the instruction of C.").

Costabadie *v.* Costabadie, 6 Hare, 410.

Crockett *v.* Crockett, 2 Phill 553 ("All and every part of my property shall be at the disposal of my most true and lawful wife, C. C., for herself and children").

Leigh *v.* Leigh, 12 Jur. 907 (Residuary devise upon trust to pay the income "unto my said wife, so long as she shall continue my widow, for the purpose of enabling her to bring up, educate, and maintain my children").

Re Harris, 7 Ex. 344 (Bequest to a wife "for the maintenance of herself and our children").

Smith *v.* Smith, 2 Jur. N. S. 967.

Brown *v.* Paull, 1 Sim. N. S. 92 (Devise to trustees upon trust for his children when they should attain twenty-one, and in the mean time "to pay unto my said wife, or otherwise apply the rents and proceeds . . . for or towards their respective maintenance, education, and advancement")

Hart *v.* Tribe, 18 Beav. 215; 1 DeG., J. & S. 418, s. c. (Bequest of £4,000 to a wife, "to be used for her own and the children's benefit, as she shall in her judgment and conscience think fit").

Carr *v.* Living, 28 Beav. 644, 33 Beav. 474, s. c. (Bequest of income to a wife for life, "for the maintenance and support of herself, and maintenance, education, clothing, and support of such child or children," &c.)

Scott *v.* Key, 35 Beav. 291 (Bequest to a wife, "to be at her sole and entire disposal for the maintenance of herself and such child or children as he might have by her").

Armstrong *v.* Armstrong, 7 Eq. 418 (Bequest of everything to a wife, "for the benefit of herself and children").

Dixon *v.* Dixon, W. N. (1876), 225 (Testator gave annuities to his son and daughters, "for their own use and support of their children").

Baty *v.* Miller, 1 Up. Can., E. & A. 218 (Gift of everything to a daughter: "I wish and desire that my daughter shall make a competent provision for my niece, Mrs. B.").

Colton *v.* Colton, 127 U. S. 300, reversing s. c., 21 Fed. Rep. 594 ("To my said wife, E. M. C., all my estate. . . . I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best").

Ex parte Dickson, 64 Ala. 188 (To my wife "for her support . . . and the support of my children").

Cockrill *v.* Armstrong, 31 Ark. 580 (Bequest to sons, "having full confidence in my sons aforesaid, and in their disposition to deal fairly, justly, and liberally, I leave it to them to make proper and suitable provision for their sisters").

Bristol *v.* Austin, 40 Conn. 438 ("I give all my estate . . . to my beloved wife, L., for her life, to be used in the support of herself and my children," with power to sell, &c.).

Hunter *v.* Stembridge, 12 Ga. 192 (Devise to a son and bequest of negro woman to a wife, "and I allow my son H. to give her a support off my plantation during her lifetime").

Heard *v.* Still, 26 Ga. 302.

Major *v.* Herndon, 78 Ky. 123 (To my wife, "which I desire she should manage for the benefit of herself and children").

Cole *v.* Littlefield, 35 Me. 439 (Bequest of income to a wife, "to be appropriated to the use of my beloved wife for her own and our children's support," &c.).

Tolson *v.* Tolson, 10 Gill & J 159 (Devise to sons: "I request my seven sons above named to take care of their brother J. T.," &c.).

Chase *v.* Chase, 2 All. 101 (Devise upon trust to pay the income to a son, "for the support of himself and his family and the education of his children").

Andrews *v.* Cape Ann Bank, 3 All. 313.

Warner *v.* Bates, 98 Mass. 274 (Bequest of income to husband for life, "in the full confidence that he will, as he has heretofore done, continue to give and afford my children such protection, comfort, and support as they or either of them may stand in need of").

Lucas *v.* Lockhart, 18 Miss. 466 (Devise to a wife during widowhood: "During . . . widowhood she is to have the entire use, profits, and control of my estate, and to her discretion do I intrust the education and maintenance of my children during that time." After the wife's death the children were to be supported out of annual profits of testator's estate).

Pratt *v.* Miller, 23 Neb. 496 (Bequest to a wife and her heirs, "for the maintenance and support of my said wife and my infant child, C. D. P.").

Erickson *v.* Willard, 1 N. H. 217 (Devise to J. W.: "I desire that the said J. W. should, at his discretion, appropriate a part of the income of my estate aforesaid, not exceeding $50 a year, to the support of M. E.").

Ward *v.* Peloubet, 2 Stockt. 304.

Billar *v.* Lowndes, 2 Dem. 590 (Gift to a wife for life, "for the support of herself and her children").

Parsons *v.* Best, 1 Th. & C. 211.

Clark *v.* Leupp, 88 N. Y. 228, revising s. c., 56 How. Pr. 519 ("To my wife, C., all of my property, . . . to take charge of my property after my death, and retain or dispose of the same for the benefit of herself and children").

Little *v.* Bennett, 5 Jones Eq. (N. Ca.) 156.

Word *v.* Morgan, 5 Cold. 407 (Bequest of everything to wife, "to dispose of and divide among my children as she may think best").

Conf. Crockett *v.* Crockett, 5 Hare, 326 ("My last desire is, that all . . . my property shall be at the disposal of my . . . wife, C. C., for herself and children"). But see 2 Phill. 553, s. c. Loring *v.* Loring, 100 Mass. 340 ("I give to my wife my personal property for her benefit and support, and the support of my son, whilst she remains unmarried"), in which cases it was held that the donee took property in trust for herself and others in equal shares. See also Fowler *v.* Hunter, 3 Y. & J 506; Wilson *v.* Maddison, 2 Y. & C. C. C. 372; Jubber *v.* Jubber, 9 Sim. 503; Pilcher *v.* Randall, 9 W. R. 251; Godfrey *v.* Godfrey, 2 N. R. 16; and conf. Chambers *v.* Atkins, 1 S. & S. 382.

In Wetherell *v.* Wilson, 1 Keen, 80 (Bequest of income to a husband, "in order the better to enable him to support, maintain, and educate" testator's children); Barnes *v.* Grant, 26 L. J. Ch. 92 (Bequest to a wife "under the firm conviction that she will dispose of and manage the same for the benefit of our children"); Rittgers *v.* Rittgers, 56 Iowa, 218 (Bequest of everything to a wife "to control the same and to have all the profits arising therefrom, for the purpose of raising, clothing, and educating the children born to us, until such time that M., our youngest child, shall attain the age of fifteen years," &c.); Anderson *v.* Crist, 113 Ind. 65 (Bequest to a wife "for the purpose of rearing and educating my children"); and Buffinton *v.* Maxam, 140 Mass. 557 (Residue to a daughter, A., "for the support of my daughter C."), it was held that the devisee or legatee took no beneficial interest whatever.

In the following cases it was held that the donee acquired the property subject to a moral but not legal obligation towards third persons. —

Benson *v.* Whittam, 5 Sim. 22 (Residuary bequest to a brother, A., "to enable him to assist such of the children of my deceased brother B. as he, the said A., may find deserving of encouragement").

Thorp *v.* Owen, 2 Hare, 607 ("I desire everything to remain in its present position during the lifetime of my wife, for her use and benefit. . . . I give the above devise to my wife that she may support herself and her children according to her discretion, and for that purpose").

Macnab *v.* Whitbread, 17 Beav. 299 (Devise to a wife "absolutely, and forever, in the full assurance and confidence and hope that she would bring up his children in the fear of God, and educate and provide for them, the same as it would have been his intention should it have pleased God to spare his life").

Byne *v.* Blackburn, 26 Beav. 41 (Bequest of income to a son-in-law during his life, "nevertheless to be by him applied for or towards the maintenance, education, or benefit" of the daughter's children).

Re Robertson's Trust, 6 W. R. 405 (Bequest to J. R., "for the support and maintenance of herself and his family").

Quayle *v.* Davidson, 12 Moo. Pr. C. 268.

Fox *v.* Fox, 27 Beav. 301 (Residuary devise to a wife, "to and for her own use and benefit, absolutely, having full confidence in her sufficient and judicious provision for my dear children").

Mackett *v.* Mackett, L. R. 14 Eq. 49 (Bequest to a wife, "to and for her own proper use and benefit forever, . . . and the proceeds to be applied by her in the bringing up and maintenance of the said J. M., and all other the children of the said S. M.").

Farr *v.* Hennis, 44 L. T. Rep. 202 (Bequest to a niece "towards support of herself and children until they shall attain the age of twenty-one").

Re Hutchinson, 8 Ch. D. 540 (Bequest of everything, "to my dear wife, H. R., absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so").

Greene *v.* Greene, 3 Ir. R. Eq. 90, 629 (Bequest to a wife, "well knowing her sense of justice, and love to her family, and feeling perfect confidence that she will manage the same to the best advantage for the benefit of her children").

M'Alinden *v.* M'Alinden, 11 Ir. R. Eq. 219 (Devise to a wife, "to be used by her in such ways and means as she may consider best for her own benefit and that of my three children"). See also Brown *v.* Casamajor, 4 Ves. 498.

Harper *v.* Phelps, 21 Conn. 257.

Bryan *v.* Howland, 98 Ill. 625 (Conveyance to A., in trust for B. for life, and to permit B. "to use, occupy, possess, enjoy, improve, and build upon" the same, "in any manner he may deem best for the support, maintenance, and benefit of himself and his children").

Zimmer *v.* Sennott, 134 Ill. 505.

Randall *v.* Randall, 135 Ill. 398.

Spooner *v.* Lovejoy, 108 Mass. 529 (Residuary devise to a wife, "to her own use, and to be disposed of at her decease, according to the terms of any will that she may leave. She is, of course, to charge herself with the education and support of our daughters, E., E., and M., so long as they shall remain unmarried").

Whitridge *v.* Whitridge, 71 Md. 105 (Income to be paid to a wife "for the sole use of herself and her children, during the term of her natural life").

Rose *v.* Porter, 141 Mass. 309 (Bequest of everything to two younger sons: "In making this disposition of my property, I assume that my eldest son will understand and appreciate my reasons for giving whatever property I may have at my decease to his younger brothers, and that they on their part will not fail to do for him and his family all that in the circumstances the truest fraternal regard may require them to do").

Sturgis *v.* Paine, 146 Mass. 354 ("And in the event of the decease of my said son, his said wife, so long as she shall survive him and continue his widow, shall in like manner receive the said rents, interest, and profits to her own use, and for the education and support of my said grandchildren at her discretion").

Corby *v.* Corby, 85 Mo. 371 (Bequest to a wife: "After providing for her own wants and comforts, I leave to the discretion of my dear wife to give to such of my

STEAD *v.* MELLOR.

IN THE HIGH COURT OF JUSTICE, BEFORE SIR GEORGE JESSEL, M. R., MARCH 12, 1877.

[*Reported in 5 Chancery Division*, 225.]

MOTION for judgment.

Ursula Crook, by her will, dated the 13th of May, 1872, appointed the plaintiffs her executors, and, after making divers specific and pecuniary bequests, gave all her personal estate, except what she otherwise bequeathed by that her will, to the plaintiffs, upon trust to convert the same into money, and, after payment of her funeral and testamentary expenses and debts, and the legacies other than specific given by her will, to hold the residue of the said moneys "in trust for such of my

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relations such aid or assistance as my dear wife may, of her own will, think proper and just," &c.).

Hunt *v.* Hunt, 11 Nev. 442 (Devise to a wife: "Having the fullest confidence in her capacity, judgment, discretion, and affection, to properly bring up, educate, and provide for our children, and to manage and dispose of my said property in the best manner for their interest and her own").

Hoxsey *v.* Hoxsey, 37 N. J. Eq. 21.

Wilde *v.* Smith, 2 Dem. 93 (Residuary bequest to S.: "It is my desire and request that S. shall watch over and care for my friend W., and see that, at no time, is she allowed to suffer or want for the necessaries of life").

Lawrence *v.* Cook, 104 N. Y. 632, reversing s. c., 32 Hun, 126 (Residue to a daughter: "I commit my granddaughter . . . to the charge and guardianship of my daughter. . . . I enjoin upon her to make such provision for my said grandchild out of my residuary estate . . . in such manner and at such times and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild and her own sense of justice and Christian duty shall dictate").

Paisley's Appeal, 70 Pa. 153 (Bequest of income to wife for life, "for her support and the support and education of my children under the direction of my executors").

Cox *v.* Rogers, 77 Pa. 160 (Bequest of the entire personalty to a wife, "to enable her to raise, support, and provide for the younger part of my family").

Biddle's Appeal, 80 Pa. 258 (Bequest of income to a wife during widowhood and minority of testator's children, "to be used and applied by her to the maintenance, support, and education of my children who may be under age, but without being called upon to give any account of the manner in which she may have applied it, as it is my wish that she shall have the absolute control of its use and disposition so long as she shall remain my widow")

Dougherty's Est., 5 W. N. C. (Pa.) 556 (Bequest to Rev. E. M.: "I earnestly request and desire that he will say or procure to be said three masses a week for the repose of my soul").

Lesesne *v.* Witte, 5 S. C N. S. 450 ("I devise all my estate to my beloved wife, feeling entire confidence that she will use it judiciously for the benefit of herself and our children").

Rhett *v.* Mason, 18 Gratt. 541 ("I devise all my estate . . . to my beloved wife, B. C. M., for her maintenance and support, and for the maintenance and support of our children during her life and widowhood").

Seamonds *v.* Hodge (W. Va. 1892), 15 S. E. R. 156 (Bequest of everything to a wife, "for the purpose of raising her children, to have and to hold to her and her heirs forever"). — ED.

nieces, Martha Paulton and Ursula Mellor Taylor, as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes."

The testatrix died on the 16th of January, 1876, leaving Mrs. Paulton and Mrs. Taylor her surviving.

The action was brought by the plaintiffs, as executors of the will, to have the rights and interests of all persons in the residuary personal estate of the testatrix ascertained and declared; and the only question calling for a report was, whether Mrs. Paulton and Mrs. Taylor were entitled to the residue beneficially or as trustees; and if as trustees, then who were the persons beneficially entitled thereto.

C. Stewart, for the plaintiffs.

Cookson, Q. C., and *Caldecott*, for some of the next of kin.

Davey, Q. C., and *W. F. Lawrence*, for others of the next of kin.

Russell Roberts, for the trustees of Mrs. Taylor's mortgage settlement.

Chitty, Q. C., and *Alfred Bailey*, for Mrs. Paulton and Mrs. Taylor, were not called on.

JESSEL, M. R. I have often said that it is the duty of the court, in construing wills of personal estate, to look at the whole will, in order to ascertain the intention of the testator, not forgetting to apply general rules of construction, where such are applicable, but always giving to the language of the instrument its literal meaning, so far as the context allows.

I have been referred to the case of Briggs *v.* Penny[1] as an authority for deciding that a trust is created. In that case, Lord Truro laid down what he considered to be the general principle. That is, of course, binding on me, although the decision itself would not necessarily be so, even if the words in the case before me were identically the same. Gibson *v.* Fisher.[2]

Now, all that Lord Truro said with respect to the principles which he deduced from the then state of authority was this: "I conceive the rules of construction to be, that words accompanying a gift or bequest expressive of confidence or belief, or desire or hope, that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: first, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and, thirdly, the objects expressed must not be too vague or indefinite to be enforced."

Lower down, he says that there is no real and substantial distinction between the case of a testator who intends to make known, or has previously made known, his views and wishes to the legatee, and the case of a testator who gives all his property to A. on trust, but never declares that trust. To this I respectfully agree. But beyond these general principles, I find nothing in Briggs *v.* Penny to guide me to a conclusion in the present case. It was a decision on the particular words of a will. It has never been followed, as far as I know; at any rate, I am not aware of any case in which words so vague and so indefinite have been held to create a trust. The words were, "well knowing that she," the legatee, "will make a good use and dispose of it in a manner in accordance with my," the testatrix's, "views and wishes." Lord Truro appears to have been of opinion that the words "well knowing" were equivalent to, if not synonymous with, the expression "in the fullest confidence," and that they were used in such a manner as to exclude all option or discretion. With all deference to his Lordship, that is a most unsatisfactory reason. Why should the words "well knowing" bear any other than their natural meaning? No reason is given why they should. However, that is the decision.

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[1] 3 MacN. & G. 149.

[2] Law Rep. 5 Eq. 51.

Whether the case of Briggs *v.* Penny was rightly or wrongly decided, (and I must not forget that it affirmed the decision of a very learned judge, the Vice Chancellor Knight Bruce,) it is distinguishable from the present case, and as the words are not the same, and I am not bound to regard it as a binding authority on the construction of the particular will now before me, I am free to inquire what the testatrix did really mean; and unless I find in the will something equivalent to a declaration that the residuary legatees take as trustees, I must hold that they take a beneficial interest. The testatrix gives all her personal estate, except what she otherwise bequeathed by her will or any codicil thereto, to trustees upon trust to convert the same into money. It is clear that she knew how to create a trust. And then, after payment of her personal and testamentary expenses and debts and legacies, she directs her trustees to hold the residue of her money upon trust for her two nieces, her desire being that they shall distribute such residue, not "in accordance with my views and wishes," as in the case before Lord Truro, or "as they know will be most agreeable to my wishes," but "as they think will be most agreeable to my wishes." What is that but to make them judges of the mode of distribution, and place the residue at their absolute disposal?

But for the case of Briggs *v.* Penny this case would not have been arguable. There must be a declaration that Mrs. Paulton and Mrs. Taylor take the residue for their own benefit.[1]

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[1] In the following cases, where the object was indefinite, the words were held to be precatory merely, and therefore to create no trust.

Robinson *v.* Dusgate, 2 Vern. 181 (Bequest of £200, "to be at the disposal of his wife, in and by her last will and testament, to whom she shall think fit to give the same").

Maskelyne *v.* Maskelyne, Amb. 750 (Legacy to a brother, "to be disposed of by him by his will as he shall see fit").

Gibbs *v.* Rumsey, 2 V. & B. 294 (Legacies of £200 to each of the trustees H. R. and J. R. Residuary bequest unto my said trustees and executors, H. R. and J. R., to be disposed of unto such person and persons, and in such manner and form, and in such sum and sums of money as they in their discretion shall think proper and expedient"). But in Buckley *v.* Bristow, 10 Jur. N. S. 1095, Sir W. P. Wood, V. C., said (p. 1097): "Lord Cottenham does not appear to have been altogether satisfied with Gibbs *v.* Rumsey; and I apprehend no case would be decided according to it where the gift is not precisely and distinctly in the words there mentioned."

Ex parte Payne, 2 Y. & C. Ex. 636.

Southouse *v.* Bate, 16 Beav. 132 (Bequest of income to B. W., "And at her death that she might leave it to her children, or whom she might choose").

Shepherd *v.* Nottidge, 2 Johns. & H. 766.

Reid *v.* Atkinson, Ir. R. 5 Eq. 373 (Bequest of everything to a wife, "to have, hold, and enjoy in the fullest and amplest manner for the term of her natural life, with full power to dispose of all the aforesaid property, both real and personal, as she may judge best and wisest, relying with implicit confidence on her discretion, and well satisfied in my mind that she will make such distribution or disposal of it as will perfectly accord with my wishes on that subject, with all of which she is thoroughly acquainted").

Bristol *v.* Bristol, 53 Conn. 242, 254 (*semble*).

Giles *v.* Anslow, 128 Ill. 187 (Devise to his wife: "I have full confidence that she will do what is best and proper with my effects, and that she would do with my property the same as I would wish to have done," &c.).

Re Keleman, 126 N. Y. 73 (Devise to T. W.: "I hereby request him to carry into effect my wishes, but this is not to be construed into an absolute direction on my part, but merely my desire").

Wells *v.* Doane, 3 Gray, 201 ("It is my will and intention that the said S. W. may dispose of the furniture, plate, pictures, and all other articles now in my house, absolutely, as he may deem expedient, in accordance with my wishes as otherwise communicated by me to him").

Wells *v.* Hawes, 122 Mass. 97 (Residuary devise to J. S., "having full confidence that he will so use and dispose of it as to carry out my wishes in regard to the distribution of my personal estate, as expressed in a memorandum which I shall leave in his possession").

Ralston *v.* Telfair, 2 Dev. Eq. 255 (Residuary bequest, "to be disposed of as my executors think proper").

Frierson *v.* Presbyterian Church (Tennessee, December, 1872), 1 So. L. Rev. 547, 559, *semble* (Bequest to executors "in their own right, trusting nevertheless and believing that, under a proper sense of their obligation to their own consciences and their accountability to God, they will, as near as they possibly can, in conformity with what I have herein indicated, pay over and contribute the same to charitable objects and purposes").

In the following cases, where the object was indefinite, the words were held to be mandatory, and therefore to create a trust, with this result, that the intended trust being ineffectual, the devisee or legatee became a constructive trustee for the heirs or next of kin.

Stubbs *v.* Sargon, 3 M. & Cr. 507.

Briggs *v.* Penny, 3 MacN. & G. 149 (A legacy of £3,000 to S. P.; also £3,000 for acting as executrix. Residue to "S. P. . . . well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes"). Compare Irvine *v.* Sullivan, 8 Eq. 673, 679.

Bernard *v.* Minshull, Johns. 276 (Testamentary appointment to a husband: "But it is my request that, after using for his own absolute use and benefit £2,000, part of that sum, . . . he will make such disposition of the remainder by will or deed or settlement as he may deem most desirable to carry out my wishes, often expressed to him by word." No wish had ever been expressed by the wife to the husband).

Buckle *v.* Bristow, 10 Jur. N. S. 1095 (Devise to trustees upon trust for such use, &c. as he should appoint: "And in default thereof, then for the same to be expended and appropriated within three years after his decease, in such way and manner and for such purposes as they, or the majority of them, might in their judgment and discretion agree upon").

Yeap Cheah Neo *v.* Ong Cheng Neo, L. R. 6 P C. 381.

Ingram *v.* Fraley, 29 Ga. 553 (Devise of everything to "my long-tried friend, W. F., . . . having the utmost confidence that he will entirely carry out my wishes and

In re DIGGLES. GREGORY *v.* EDMONDSON.

In the Court of Appeal, July 6, 1888.

[*Reported in* 39 *Chancery Division*, 253.]

Mary Ann Diggles, widow, made her will, dated the 4th of August, 1868, as follows: "I give, devise, and bequeath all my real and personal property and effects unto my daughter, Frances Edmondson, her heirs and assigns, and it is my desire that she allows to my relative and companion, Anne Gregory, now residing with me, an annuity of £25 during her life, and that the said Anne Gregory shall if she desire it, have the use of such portions of my household furniture, linen, &c. as may not be required by my daughter, Frances Edmondson. I desire that my gold watch may be given to my grandson Alfred Thomas Edmondson, and my small diamond and emerald ring to my granddaughter Frances Mary Edmondson. And I hereby appoint my said daughter Frances Edmondson and her husband Alfred Edmonson, executrix and executor of this my will."

The testatrix died on the 16th of September, 1872, and the will was proved by Alfred Edmondson, power being reserved to Frances Edmondson.

The £25 a year was paid to Anne Gregory down to 1883. The payment was then discontinued, and in March, 1886, Anne Gregory com-

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desires as they may be expressed by me, either verbally or in writing; and well knowing that my said friend will, by this will, be able much more effectually to dispose of my estate, as I wish it done, than I could at this time do myself, and with much less trouble to himself").

Saylor *v.* Plaine, 31 Md. 158 (Residue to M. S. O. and W., "to dispose of according to his or their verbal directions").

Maught *v.* Getzendanner, 65 Md. 527 (Residue to Rev. H. G. O.: "And I desire him to use and appropriate the same for such religious and charitable purposes and objects, and in such sums and in such manner, as will, in his judgment, best promote the cause of Christ").

Nichols *v.* Allen, 130 Mass. 211 (Residuary bequest "to my executors and the survivor of them, or their successors, if any such should be appointed, to administer on my estate, to be by them distributed to such persons, societies, or institutions as they may consider most deserving").

Schmucker *v.* Reel, 61 Mo. 592 ("To A., to be applied by him to a specific purpose which I have explained to him").

Willets *v.* Willets, 103 N. Y. 650, reversing s. c., 35 Hun, 401, Rapallo, J. dissenting ("I do give and bequeath to my son R. W., my friends, W. H. M. and C. G., and my nephews J. T. W., R. R. W., and E. B. W., and my son-in-law E. M., the survivors and survivor of them, the sum of $100,000, relying upon them to dispose of the same for the benefit of such charitable and benevolent and educational purposes as they shall judge will most promote the comfort and improve the condition of the poor; or in case any of my descendants should become poor and needy, then to apply in whole or in part to such descendants").

Re Ingersoll (N. Y. 1892), 31 N. E. R. 47. — Ed.

menced this action in the Court of Chancery of the County Palatine against Mr. and Mrs. Edmondson, claiming (1) payment by the defendants of the arrears of the annuity and of a sufficient sum to purchase a government annuity of £25 for her life, or the appropriation of a sufficient sum to meet the annuity, and (2) administration, if necessary, of the real and personal estate of the testatrix, on the footing of wilful default.

The Vice Chancellor of the County Palatine, on the 15th of March, 1887, made an order declaring that Mrs. Edmondson became entitled to the real and personal property and effects of the testatrix, subject to a valid trust to pay thereout to the plaintiff an annuity of £25 during her life. The order went on to direct administration of the estate on the footing of wilful default as against Alfred Edmondson.[1]

The plaintiff appealed, asking for an order in the terms of the claim. The defendants gave notice that they should contend that the judgment, so far as it declared a trust in favor of the plaintiff, should be reversed, and that the order directing accounts and inquiries should be discharged and the action dismissed.

Rotch, for the appellant.

Neville, Q. C., and *Horridge*, for the defendants.

COTTON, L. J. This is an appeal from a judgment of the Vice Chancellor of the County Palatine, who has directed accounts and inquiries as to the estate of Mrs. Diggles, at the suit of Anne Gregory, who claims to be entitled to an annuity of £25 under her will. The question is, whether upon the true construction of the will Anne Gregory was a legatee. I think that the testatrix clearly did not intend the £25 a year to be provided for by the executors in the discharge of their duties as such. The Vice Chancellor has directed accounts of the estate, and the appellant, who asks for more than the Vice Chancellor gave her, contends that it was the duty of the executors to set aside a sufficient part of the assets to provide for the annuity, before handing over the residue to the residuary legatee. This contention, in my opinion, is unfounded. The direction, if binding direction there be, is one to be performed by the residuary legatee, and not by the executors. But does it impose any trust or duty on her as the Vice Chancellor has held that it does? I think not. I think that what the testatrix meant was, to leave all her property to her daughter, with the expression of a wish that she would allow Anne Gregory £25 a year, and give her any part of the furniture which she did not want. She means to put her daughter in her own place, saying, "I ask you to make what I think would be a proper provision for Anne Gregory," but without intending to bind her to do so. Construing the will without reference to the authorities, I think that is its true construction. It is said, however, that the authorities support the appellant's contention. No doubt in the old cases slight expressions were laid hold of to create a trust, but the recent authorities have gone the other way. I adhere to what I said in *In re* Adams and the Kensington Vestry:[1] "Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will." A reasonable construction is to be given to the will; and in my opinion upon the reasonable construction of this will the testatrix cannot be held to have intended to give a binding direction. In my judgment, therefore, the action must be dismissed.[2]

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[1] The opinion of Bristowe, V. C., given in a note, the arguments of counsel on the appeal, and the concurring opinions of Bowen and Fry, L. JJ., are omitted. — ED.

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[1] 27 Ch. D. 394, 410.

[2] In the following cases, where the subject, object, and mode of distribution were clearly defined, the words were held to be mandatory, and therefore to create a trust: —

Eeles *v.* England, 2 Vern. 466; Prec. Ch. 200, s. c. (Bequest of £300 to R. H.: "but my will and desire is that he will give the said £300 unto his daughter Susan at the time of his death, or sooner, if there be occasion for her better advancement and preferment").

Clifton *v.* Lombe, Amb. 519 ("In consideration that Lady Lombe has promised to give what I shall give her to her and my children at her death, I give her," &c.).

Bute *v.* Stuart, 1 Bro. P. C. (Toml. ed.) 476; Tibbits *v.* Tibbits, 19 Ves. 656; Jac. 317, s. c. (Devise to a son: "And I do hereby recommend to my said son to continue his cousins J. T. and R. T. in the occupation of their respective farms in the county of Warwick, as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay the rents").

Taylor *v.* George, 2 V. & B. 378 (To a brother. Codicil: "I do hereby require and entreat my dear brother that he will either by will or deed settle and secure £500 to be paid at his decease to E. T. . . . I have omitted to express the same in my will, not doubting but my dear brother will readily comply with the request").

Prevost *v.* Clark, 2 Mad. 458 ("Convinced of the high sense of honor, the probity and affection of my son in law, Edward Clarke, I entreat him, should he not be blessed with children by my daughter, and survive, that he will leave at his decease to my children and grandchildren the share of my property I have bestowed upon her").

Horwood *v.* West, 1 S. & S. 387 (Testator gave everything by will to his wife, and recommended her by her will to give what she should die possessed of to certain persons named).

Parker *v.* Bolton, 5 L. J. N. S. Ch. 98 (Devise of land to a son: "And I do advise him to settle it upon himself and his issue male by his lawful wife," &c.).

Hinxman *v.* Poynder, 5 Sim. 546.

Baker *v.* Mosley, 12 Jur. 740 (Bequest to A., "trusting that he would preserve the same, so that after his decease it might go to and be equally divided between his then present son and three daughters by his late wife Alice").

Ford *v.* Fowler, 3 Beav. 146 (Bequest to a daughter: "And I recommend to my said daughter and her said husband that they do forthwith settle and assure the said sum, together with such sum of money of his own as the said husband shall choose, for the benefit of my said daughter and her children").

Wace *v.* Mallard, 21 L. J. Ch. 355 (Testator gave his entire property to his wife, "in full confidence that she will, in every respect, appropriate and apply the same unto and for the benefit of all my children").

Bonser *v.* Kinnear, 2 Giff. 195.

See Nowlan *v.* Nelligan, 1 Bro. C. C. 489.

Cary *v.* Cary, 2 Sch. & Lef. 173, 189 (To a son, "in order to exonerate my real estate and enable my son to pay off my said debts and encumbrances").

Malone *v.* O'Connor, Ll. & G. t Plunket, 465.

Wilson *v.* Graham, 12 Ont. 469.

McRee *v.* Means, 34 Ala. 349 (Residuary bequest to a husband, to his use, behoof, and benefit in fee simple, "but should my said husband die without issue of his body, it is my wish and will he shall give all of said property to R.").

Reed *v.* Reed, 30 Ind. 419 ($200 to my son, "which said $200 it is my wish my son shall add to the advancement he may make to his son R., when R. comes of age").

Bohn *v.* Barrett, 78 Ky. 378 ("It is my request, . . . but this request is not to be legally binding upon him, but I desire to leave the same entirely to his discretion, and to make no requirement of him that would be legally binding in a court of equity or elsewhere").

Negroes *v.* Plummer, 17 Md. 165 (Devise of everything to a sister: "It is my wish and desire, in case my said sister die without issue, that she shall will and devise all my negroes to be free, or manumit them in any other way she may think proper; this request I hope she will comply with in time, so as to carry my wish into effect").

Hondley *v.* Wrightson, 60 Md. 198 ("To my wife . . . with a special request that at her death she give the said lands to be equally divided between her near relatives and mine").

Rich *v.* Rogers, 14 Gray, 174 (Bequest to trustees for the benefit of testator's sisters and their children).

Van Duyne *v.* Van Duyne, 2 McCart. 503, reversing s. c. 1 McCart. 397 (Devise to two children, "hoping and believing they will do justice hereafter to my grandson, H. V. D., to the amount of one half of the said homestead farm").

Eddy *v.* Hartshorn, 34 N. J. Eq. 419 ("To P. H. . . . with the request that upon his death he leave the same to A. and B. in equal portions").

Eberhardt *v.* Perolin (N. J. Eq. 1892), 23 Atl. R. 501.

Phillips *v.* Phillips, 112 N. Y. 197 (Bequest of everything to a wife, "If she find it always convenient . . . to give my brother E. W. during his life $700 per annum, I wish it to be done").

Cook *v.* Ellington, 6 Jones Eq. (N. Ca.) 371 (Bequest to a wife, "and my wish is that, at her death, she will give the one half of all I give her . . . to my brother J. P. C.").

Anderson *v.* Hammond, 2 Lea, 281 (To a wife: "It is my wish and desire that my wife shall pay $200 annually . . . to my nephew J. L., for the purpose of educating him").

Harrison *v.* Harrison, 2 Grat. 1 ("In the utmost confidence in my wife, I leave to her all my worldly goods, to sell or keep for distribution amongst our dear children, as she may think proper. My whole estate, real and personal, is left in fee simple to her, only requesting her to make an equal distribution amongst our heirs").

Knox *v.* Knox, 59 Wis. 172 (Gift to wife of "all my real and personal estate, . . . having full confidence in my said wife, and hereby request that, at her death, she will divide equally . . . between my sons and daughters all the proceeds of my said property," &c.).

In the following cases, where the subject, object, and mode of distribution were clearly defined, the words were held to be precatory merely, and therefore to create no trust: —

Cunliffe *v.* Cunliffe, Amb. 686 (Bequest to a son: "Nevertheless, in case his son Ellis should happen to depart this life without a son or sons born of his body in his lifetime, or in due time after his death, then and in such case he recommended it to him to give and devise the said sugar-houses and joint stock in trade there to his brother Robert").

Hoy *v.* Master, 6 Sim. 568 ("The other two thirds shall be at the sole and entire disposal of my said wife, Louisa Bird, trusting that, should she not marry again and have other children, her affection for our joint offspring, the said Marian Bird, will induce her to make our said daughter her principal heir").

Young *v.* Martin, 2 Y. & C. Ch. 582 (Testator gave his daughter a free power of appointment over certain property, adding that he recommended, though he did not absolutely enjoin, his daughter to distribute the same, at her decease, amongst her daughters in equal shares).

Winch *v.* Brutton, 14 Sim. 379; Huskisson *v.* Bridge, 4 DeG. & Sm. 245.

Webb *v.* Wools, 2 Sim. N. S. 267 (Gift of everything "unto my dear wife, Jane, to and for her own use and benefit, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children").

Palmer *v.* Simmonds, 2 Drew. 221 (Residuary devise to a nephew, "for his own use and benefit, as I have full confidence in him that, if he should die without lawful issue, he will . . . leave the bulk of my said residuary estate unto the said W. F. S., J. S., and T. E. S. equally").

Eaton *v.* Watts, 4 Eq. 151 (Bequest of everything "to my dearly beloved husband, . . . hoping that he will leave it after his death to my son W. C. W., if he is worthy of it, with certain conditions hereunto annexed, viz.").

House *v.* House, W. N. (1874), 189 (Residuary bequest "unto my said son John, requesting him that, if he should not find an opportunity to dispose of my freehold estate at Whitechurch greatly to his advantage, and to the benefit of his family, that the said estate should belong, after him, to his eldest son"). No trust

Wheeler *v.* Wheeler, 1 Giff. 300; Lefroy *v.* Flood, 4 Ir. Ch. 1.

McCormick *v.* Grogan, 1 Ir. R. Eq. 313; L. R. 4 H. L. 82, s. c.

Ellis *v.* Ellis, 15 Ala. 296 (Bequest of everything to a wife, "recommending to her at the same time to make some allowance, at her convenience, to each of my brothers and sisters; say to each $1,000"). No trus

Re Whitcomb's Estate, 86 Cal. 265 (Devise to a nephew: "I recommend to him to leave his portion thereof, after his own death and the death of his wife, to his son and his children and descendants, and in default of such to Harvard College").

Hess *v.* Singler, 114 Mass. 56 (Residuary devise to a son: "I hereby signify to my said son my desire and hope that he will so provide, by will or otherwise, that, in case he shall die leaving no lawful issue living, the property which he will take under this will shall go in equal shares" to certain specified persons).

Sears *v.* Cunningham, 122 Mass. 538 (Devise of everything to a wife, "in her own name and for her own purposes, with only this condition, . . . and that I wish, at the death of my wife C., that she should make an equal division of her estate to such children as survive her").

Barritt *v.* Marsh, 126 Mass. 213 (Bequest to a wife: "I wish my wife, when she dies, to give her property to my daughters. It is my desire that my property should, after the decease of my wife and daughters, descend to the children of my daughters respectively if they are married").

Bacon *v.* Ransom, 139 Mass. 117 (To A. and B. "as their absolute property. . . . I request A. and B. to use the fund to further what is called the Woman's Rights Cause. But neither is under any legal responsibility to any one or any court to do so").

Wood *v.* Seward, 4 Redf. 271 (Provision that A. and B. should occupy a certain house: "But this clause in my will is not to be considered as a direction, but merely as a suggestion of my wish or desire").

Bowker *v.* Wells, 2 How. Pr. N. S. 150 (Devise to four persons, "having entire confidence that these four gentlemen will, although under no legal obligation so to do, observe my wishes; and my wish is," &c.). In L.R. 1895, 2 Ch. 271.

See Speairs *v.* Ligon, 59 Tex. 233.

In the following cases, where a discretion was given as to the mode of distribution among persons of a defined class, the words were held to be mandatory, and therefore to create a trust: —

Brest *v.* Offley, 1 Ch. Rep. 241.

Burrell *v.* Burrell, Amb. 660; Mason *v.* Linbury, cited in Amb. 4, and 2 Ves. 67 ("I give to my brother, Robert Mason, £2,000, which I desire him, at his death, to give to his son and his children, and to the children of his late daughter, as he should think fit").

Massey *v.* Sherman, Amb. 520 (Devise of copyhold to his wife in fee, "not doubting but that my wife will dispose of the same to and amongst my children, as she shall please").

Pierson *v.* Garnet, 2 Bro. C. C. 38, 226 (Bequest to P. P.: "And it is my dying request to the said P. P., that, if he shall die without leaving issue living at his death, that the said P. P. do dispose of what fortune he shall receive under this my will to and among the descendants of my late aunt, A. C., his grandmother, in such manner and proportion as he shall think proper").

Richardson *v.* Chapman, 7 Bro. P. C. (Toml. ed.) 318.

Brown *v.* Higgs, 8 Ves. 561 ("I authorize and empower my nephew John Brown to receive the rent," &c., "and to dispose of it in the following manner, that is to say, to take £100 of it every year to his sole and separate use, and to employ the remainder . . . to such children of my nephew Samuel Brown as my said nephew John Brown shall think most deserving, and that will make the best use of it").

Parsons *v.* Baker, 18 Ves. 476 (Devise to a nephew, "not doubting, in case he should have no child or children of his own body, but that he will dispose and give my said real estate to the female descendants of my sister, Deborah Parsons, of Kemerton, widow, in such part or parts and in such manner as he shall think fit, in preference to any descendant on his own female line").

Birch *v.* Wade, 3 V. & B. 198 ("It is my Will and Desire that the other third Part of the Principal of my Estate and Effects be left entirely to the Disposal of my dear and loving Wife among such of her Relations as she may think proper after the Death of my aforesaid Sisters").

Forbes *v.* Ball, 3 Mer. 437 ("I give to my dear wife, Ann Cotterel, the sum of £500; and it is my will and desire that my said wife, Ann Cotterel, may dispose of the same amongst her relations, as she by will may think proper").

Walsh *v.* Wallinger, 2 Russ. & M. 78 (Devise of residue "unto his said wife, to and for her own use and benefit and disposal, trusting that she would thereout provide for and maintain his family, and particularly his eldest son; and, at her decease, give and bequeath the same to her children by him, in such manner as she should appoint").

Blakeney *v.* Blakeney, 6 Sim. 52 (Residue "to my sister, A. B., to dispose of amongst her children as she may think proper").

Salusbury *v.* Denton, 3 K. & J. 529 ("The remainder of said moiety to be at her disposal among my relations, in such proportions as she may be pleased to direct").

Gully *v.* Cregoe, 24 Beav. 185 (Devise to a wife, "for her own sole use and benefit forever, feeling assured and having every confidence that she will hereafter dispose of the same fairly, justly, and equitably amongst my two daughters and their children").

Shovelton *v.* Shovelton, 32 Beav. 143 (Bequest of residue "unto my said dear wife, to and for her own absolute use and benefit, in the fullest confidence that she will dispose of the same for the benefit of her children, according to the best exercise of her judgment, and as family circumstances may require at her hands").

Re Eyre, 49 L. T. Rep. 259 ("To A. and B., who shall hold . . . as A. and B. shall in their absolute discretion . . . appoint. And my reason for giving the said general power of appointment to A. and B. is that I have the fullest confidence in them that they will do what is right and proper, and that they will dispose of the property subject to said power justly and fairly, and as they think it ought to be disposed of and divided by me." A. and B. also received legacies).

Corbet *v.* Corbet, Ir. R. 7 Eq. 456 (Bequest to a sister: "And I beg she will apportion between the above named [naming four nieces], and, as my nephew J. C. has a less secure position in life than his brothers, to him such portion or portions as she shall see fit. I would also wish that she should have power to give some small amounts for charity, especially to D. I.'s family").

Bull *v.* Bull, 8 Conn. 47 (Residuary bequest to A. and B., "with full confidence . . . that they will dispose of such residue among our brothers and sisters and their children as they shall judge shall be most in need of the same; this to be done according to their best discretion").

Blanchard *v.* Chapman, 22 Ill. Ap. 341 ("And having and reposing implicit confidence in the goodness and kindness of my dear wife, I rely upon her to make . . . and all needful provision for the future wants of my brother S.").

Collins *v.* Carlisle, 7 B. Mon. 13 (Residuary bequest "to my beloved wife, N. C., and to be disposed of by her and divided among my children at her discretion").

Noe *v.* Kern, 93 Mo. 367 (Bequest of everything to a husband, "in the full faith that he will properly provide for the two children of my deceased brother . . . whom we have undertaken to raise and educate").

Cox *v.* Wills, N. J. Eq. 22 Atl. R. 794 (Residue to wife, "believing that she will make a will, and thereby distribute so much . . . among my near relatives as she may not use for comfortable maintenance; and it is my will that my said wife shall make such distribution").

Aldrich *v.* Aldrich, 12 R. I. 141.

Jarnagin *v.* Conway, 2 Humph. 50 (Devise to a wife, "with power to dispose of the same as she might deem proper amongst her children").

Anderson *v.* Cullough, 3 Head, 614 (Devise to a wife, "believing that she will make an equitable distribution at her death among our children").

Steele *v.* Levisay, 11 Grat. 454. See Reid *v.* Blackstone, 14 Grat. 363.

In Wace *v.* Mallard, 21 L. J. Ch. 355, 16 Jur. 492, s. c., Sir James Parker, V. C., held that a gift of everything to the testator's wife, "to and for her sole use and benefit, in full confidence that she, my said wife, will in every respect appropriate and apply the same unto and for the benefit of all my children," created a life estate in the widow, with a mandatory power of appointment in favor of the children. But see observations upon this case in 1 Jarm. Wills, (5th Am. ed.) 688. Much reliance was placed upon Wace *v.* Mallard in Curnick *v.* Tucker, L. R. 17 Eq. 320, where a gift of everything to testator's wife, "for her sole use and benefit, in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at her decease, doing equal justice to each and all of them," seemed to Sir Charles Hall, V. C., to import a trust. But this case, as well as Le Marchant *v.* Le Marchant, L. R. 18 Eq. 414, before Sir R. Malins, V. C. (Gift of everything to testator's wife, "for her sole use and benefit, in the full confidence that she will so bestow it on her decease to my children in a just, true, and equitable spirit, and in such manner and way as she feels would meet with my full approval"), met with the disapproval of Sir George Jessel, M. R., in *Re* Hutchinson, 8 Ch. D. 540.

In the following cases, where a discretion was given as to the mode of distribution among persons of a defined class, the words were held to be precatory, and therefore to create no trust: —

Buggins *v.* Yates, 9 Mod. 122 (Testator did not doubt but his wife would be kind to his children).

Sale *v.* Moore, 1 Sim. 534 (Residuary bequest to a wife, "recommending to her, and not doubting, as she has no relations of her own family, but that she will consider my near relations . . . as I should consider them").

Meredith *v.* Heneage, 1 Sim. 542 ("I have devised and bequeathed the whole of my said real and personal estate, hereinbefore particularly set forth, unto my said dear wife, . . . unfettered and unlimited, in full confidence and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference"). See to the same effect Heneage *v.* Andover, 10 Price, 233.

Benson *v.* Whittam, 5 Sim. 22 ("The residue of said dividends to my brother, Arthur Benson, to enable him to assist such of the children of my deceased brother, Francis Benson, as he the said Arthur Benson shall find deserving of encouragement").

Bardswell *v.* Bardswell, 9 Sim. 319 (Bequest of everything to a son, "for his own use and benefit, well knowing he would discharge the trust the testator reposed in him by remembering the testator's sons and daughters").

Pope *v.* Pope, 10 Sim. 1 (Residuary bequest to a wife: "And my reason for so doing is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me and her dear children, so husband and take care of what property there may be for their good; and should she marry again, then I wish she may convey to trustees . . . what property she may then possess for the benefit of the children as they may severally need or deserve, taking justice and affection for her guide").

Knight *v.* Boughton, 11 Cl. & Fin. 513 ("I trust to the justice of my successors in continuing the estates in the male succession, according to the will of the founder of the family").

Williams *v.* Williams, 1 Sim. N. S. 358 ("It is my wish that you [the testator's wife] should enjoy everything in my power to give, using your judgment as to whom to dispose of it amongst your children when you can no longer enjoy it yourself; but I should be unhappy if I thought it possible that any one, not of your family, should be the better for what, I feel confident, you will so well direct the disposal of").

Green *v.* Marsden, 1 Drew. 646 (Bequest of stock to a wife: "And I beg and request that at her death she will give and bequeath the same, in such shares as she shall think proper, unto such members of her own family as she shall think most deserving of the same").

Johnston *v.* Rowlands, 2 DeG. & Sm. 356 ("As to the sum of $2,000 . . . I give the same to my said wife, to be disposed of by her will in such way as she shall think proper; but I recommend her to dispose of one half thereof to her own relations, and the other half among such of my relations as she shall think proper").

Brook *v.* Brook, 3 Sm. & G. 280 (Devise to testator's niece, M. A. B., "to be her sole and separate property, . . . and with power . . . to appoint the same to her children and her husband in such a way and in such proportions as she may think fit").

Alexander *v.* Alexander. 2 Jur. N. S. 898 ("And my sons in law, F. H. and W. S. A., may dispose of the property I leave for the good of their families").

Reeves *v.* Baker, 18 Beav. 372 ("The residue of my property . . . to my beloved wife, Mary Reeves, her heirs and assigns forever, being fully satisfied that . . . she will dispose of the same, by will or otherwise, in a fair and equitable manner, to our united relations, bearing in mind that my relations are generally in better worldly circumstances than hers are").

Howorth *v.* Dewell, 29 Beav. 18 (Residuary bequest to a wife, "with power for her to dispose of the same unto and amongst all of my children, or to any one or more of them, for such estate or estates, either in fee simple or in tail, term of life or other interest, temporary or lasting, . . . as my said wife shall, in her discretion, see most fitting and proper").

Scott *v.* Key, 35 Beav. 291 ("The balance . . . to go to my dear wife, being well assured that she will husband the means that may be left to her by me with every prudence and care, for the sake of herself and any children that I may leave by her").

In re Pinckard's Trust, 27 L. J. Ch. 422.

In re Bond, 4 Ch. D. 238 (Residuary bequest to a wife, "And for my dear wife, A. B., to do justice to those relations on my side such as she may think worthy of remuneration, but under no restriction as to any stated property, but quite at liberty to give and distribute what and to who my dear wife may please").

In re Hutchinson, 8 Ch. D. 540 ("To my dear wife, H. R., absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so").

Mussoorie Bank *v.* Rayner, 7 App. Cas. 321 ("To my wife, . . . feeling confident that she will act justly to our children in dividing the same when no longer required by her").

Re Adams Vestry, 24 Ch. D. 199, 27 Ch. Div. 394 ("To the absolute use of my wife, . . . in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease").

Creagh *v.* Murphy, 7 Ir. R. Eq. 182; Morrin *v.* Morrin, L. R. 19 Ir. 37.

Montreal Bank *v.* Bower, 18 Ont. 226 (Absolute gift to a wife: "And it is my wish and desire, after my decease, that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children in such manner as she shall deem just and equitable").

Gilbert *v.* Chapin, 19 Conn. 342 (Residuary bequest to a wife, "recommending to her to give the same to my children, at such time and in such manner as she shall think best").

Lines *v.* Darden, 5 Fla. 51 (Bequest to a daughter: "My will and desire is that such grandson so arriving at the age of twenty-one years . . . shall receive a portion of the estate as a loan, to have the management and receive the benefit of the same until the final distribution shall take place, and then to return the same to be equally divided with the rest of my estate").

Sale *v.* Thornberry, 86 Ky. 266 (Devise to a wife in fee simple: "I only make this request of her, and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz.: that in the event she should marry again she will see that the interests of our children in said property are protected").

Gibbins *v.* Shepard, 125 Mass. 541 (Bequest to a wife "for her support during her lifetime, and leaving it as an injunction on her to divide it on the children at her death, as she deems best, and as they deserve").

Sturgis *v.* Paine, 146 Mass. 354 (Residuary devise to a wife "at her sole use and disposal. . . . My said wife is fully acquainted with my reasons for this disposal of my estate, and will by her own last testament do what is right and just to my children and their natural heirs").

Foose *v.* Whitmore, 82 N. Y. 405 ("All my property to my wife, only requesting her at the close of her life to make such disposition of the same among my children and grandchildren as shall seem to her good").

Re Ingersoll, 59 Hun, 571 (Bequest of $1,000 to A. "forever, for the uses and purposes before stated, and I rely upon him to carry out the wishes and purposes that I have hereinbefore indicated").

Alston *v.* Lea, 6 Jones Eq. (N. Ca.) 27 (Bequest to a wife, "so that she can have the right to give it to our six children as she may think best").

Re Pennock's estate, 20 Pa. 268 (Bequest to a wife "absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among my children").

Kinter *v.* Jenks, 43 Pa. 445 (Residuary bequest to a wife, "for her use and comfort and to be disposed of as she pleases at or before her decease, when, no doubt, she will make such distribution of the same amongst our children as she may then think most proper"). See Burt *v.* Herron, 66 Pa. 400.

Bowlby *v.* Thunder, 105 Pa. 173 (To a wife, "with the fullest confidence that she will carry my intentions . . . into effect, so far as, in her opinion, my children and grandchildren . . . may prove worthy of her attention. . . . Memorandum for her, . . . the two frame houses N. E. corner of Lombard and 10th Streets, to the children of my daughter Anne," etc.).

Lesesne *v.* Witte, 5 S. Ca. N. S. 450 ("I devise all my estate to my beloved wife, feeling entire confidence that she will use it judiciously for the benefit of herself and our children").

Rowland *v.* Rowland, 29 S. Ca. 54 ("I desire that my wife shall advance to such child or children such an amount, either in property or money, as she deems prudent, but not exceeding a distributive share of my estate, as it is my intention for my wife to keep as much of my estate as will make her comfortable").

Thompson *v.* McKisick, 3 Humph. 631 (Bequest of property to a daughter, "to be hers forever, to be disposed of as she may think proper amongst her children and grandchildren, by will or otherwise").

See Wright *v.* Atkyns, Cooper, 121, 122; T. & R. 143; 17 Ves. 255; 19 Ves. 299; 1 V. & B. 313; Sugd. Law of Prop. 376, S. C.; Van Amee *v.* Jackson, 35 Vt. 173. — ED.

AHEARNE *v.* AHERNE.

IN THE HIGH COURT OF JUSTICE, IRELAND, CHANCERY DIVISION, BEFORE SIR EDWARD SULLIVAN, M. R., JULY 15, 1881.

[*Reported in Law Reports,* 9 *Irish,* 144.]

THE MASTER OF THE ROLLS.[1] The testator, Thomas Ahearne, had two children, a son (the plaintiff, Thomas M. W. Ahearne), and a daughter, Isabella Ahearne, who was married. He made his will, the parts of which material to the question before me are as follows: — "I devise and bequeath to my said son and to my daughter the farm called Sunville, situate in the county of Cork, with all the stock and cattle thereon, and also all the farm utensils and other plant thereon, to hold to them share and share alike." He also bequeathed to the plaintiff and the defendant a sum of £3,900 held by him on deposit receipt, and £252 to his credit in the Provincial Bank; and the will contained this clause: "My will is that the bequests to my said daughter shall be for her sole and separate use, to be held by her for her life, with a power of appointing same among her children."

Thus, he first devised an absolute interest to his son and his daughter as tenants in common; and if he had stopped there, the daughter would have taken a moiety absolutely. But, apparently with a view to correct what he had done, and to point to something else which he had in his mind of a different character, he added the second clause, by which he declared that the bequest to his daughter should not be an absolute bequest, but should be for her life, with a power of appointing same amongst her children. He then appointed his son and his daughter residuary legatees, but that residuary bequest deals only with pure personal estate. The question arises whether the children took under the will, apart from the discretion of their mother, or whether she could, by not exercising the power, exclude them. I am of opinion that she could not, and that this is a trust for the children, subject to a power of appointment in her.

The principle upon which this case depends is thus stated by Lord St. Leonards in his work on Powers, 8th ed., p. 589: "The question whether a power is simply such, or a power in the nature of a trust, commonly arises on a power to appoint to a man's children or relations. In Brown *v.* Higgs,[2] Lord Eldon stated the principle of all the cases on this subject to be, that if the power is a power which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, *who has given him an interest extensive enough to enable him to discharge it*, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those for whose benefit he is called upon to execute it." And in § 9 he states "In all these cases, although in terms no obligation was imposed on the donee to exercise the power, and although in some he had a discretion to select from the class the individuals to take, yet as the property was given to him generally with such a power, and his own interest was confined to his life by plain construction, an intention was collected that the interest beyond his own life was to vest in the objects, and that he having a sufficient estate for that purpose, and a power, was bound to give effect to that intention; and his neglect to exercise his discretion, or to execute his power among the objects — where none was to be excluded — was not permitted to operate to the detriment of the *cestuis que trust*." In my opinion, that is the exact case before me. The will gives the donee of the power an estate amply sufficient to discharge the trust, and plainly cuts down her interest to a life interest. The words are remarkable: "My will is that the bequests to my said daughter, Isabella Aherne, shall be for her sole and separate use, *to be held by her for her life*, with a power of appointing same amongst her children."

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[1] See *supra*, p 70, n. 1.—ED.

[2] 8 Ves. 574.

It is said that Healy *v.* Donnery[1] is an authority against this view. It is sufficient to mention the names of the judges (Baron Pennefather and Baron Greene) who decided that case, to satisfy everybody that nothing could be further from my mind than to overrule them. That case does not appear to me to be applicable to this. It fails in a most material circumstance; no estate was given to the donee of the power in the first instance, although Baron Greene, in a doubtful passage of his judgment, is reported to have said that there was. The will in that case was in these words: "I leave, devise, and bequeath unto my said daughter, Margaret Healy, all my freehold interest in North King Street, in the city of Dublin, upon trust to receive the rents, &c. thereof for and during the term of her natural life, for her sole use, notwithstanding her coverture, without the control of her present or any future husband, &c., with power to my said daughter by any deed or will to dispose of, devise, or bequeath the said freehold estate to and among her children, in such shares and proportions as she shall think fit and proper." That is not the case before me of an absolute estate given to the donee in the first instance, cut down to a life estate by the subsequent words. Lord Romilly, in Howorth *v.* Dewell,[2] points out the distinction between the case of an absolute interest given in the first instance, with a superadded power and the case of a life interest and a mere power to appoint. He says: "I think this is an absolute gift in the first instance; that the testator gave all his real and personal estate to his wife, with a superadded power to dispose of the same among certain persons. I am of opinion that he meant to suggest to her how she might dispose of it at any time afterwards;

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[1] 3 Ir. C. L. R. 213.

[2] 29 Beav. 19.

but it does not amount to a precatory trust, or cut down the previous absolute interest. It is quite distinct from all those cases in which there were gifts for life with a superadded power. This is an absolute interest with a superadded power, which, in my opinion, does not cut down the absolute interest." And Lord St. Leonards, in referring to Healy *v.* Donnery,[1] treats it as having been decided on the ground that only a life estate was given in the first instance, as in the case of Brook *v.* Brook.[2]

I am, therefore, of opinion that the case of Burrough *v.* Philcox,[3] in which Lord Cottenham followed Brown *v.* Higgs,[4] rules this case.

Lord Cottenham says,[3] "In this case the intention is not to be found only in the power given to select and distribute, for the testator has directed his trustees to hold the property until the contingency has happened; and as to the land, that it shall not be alienated in the mean time, and has himself declared that, in the events which have happened, the property should be disposed of as after mentioned. This is imperative, and is conclusive as to the intention that the subsequent gift should take effect."

I rule that the daughter takes for life, with a power of appointment among her children, and that in default of appointment the property goes equally among the children.[5] The costs must be paid out of the estate.

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[1] 3 Ir. C. L. R. 213.

[2] 3 Sm. & Gif. 280.

[3] 5 M. & Cr. 94.

[4] 4 Ves. 708; 8 Ves. 574.

[5] Griffith *v.* Evans, 5 Beav. 241; Butler *v.* Gray, 5 Ch. 26; Dominick *v.* Sayre, 3 Sandf. 555 *Accord.*

Crossling *v.* Crossling, 2 Cox, 396, and Duke of Marlborough *v.* Godolphin, 2 Ves. 61, *contra*, are no longer to be relied upon. See Burrough *v.* Philcox, 5 M. & Cr. 73; 1 Jarman, Wills, (4th ed.) 551, n. (k).

Compare Reid *v.* Atkinson, Ir. R. 5 Eq. 373, *supra*, p. 94.

"But there is no case where the gift of a mere power superadded to the fee simple has been held to create a trust in favor of particular objects and to cut down the absolute gift, unless on expressions sufficiently strong and clear to amount to a devise on trust in favor of the objects of the power." Brook *v.* Brook, 3 Sm. & G. 280, 282; Howorth *v.* Dewell, 29 Beav. 18; Healy *v.* Donnery, 3 Ir. C. L. R. 213; 1 Jarman, Wills, (4th ed.) 387, n. (w). But see, *contra*, Jarnagin *v.* Crawley, 2 Humph. 50. — ED.

SECTION VII.

Consideration.

DOCTOR AND STUDENT.

DIALOGUE II., CHAPTERS 22, 23.

1523.

Doctor. May not a Use be assigned to a Stranger, as well as to be reserved to the Feoffor, if the Feoffor so appointed it upon his Feoffment?

Student. Yes, as well, and in like wise to the Feoffee, and that upon a free Gift, without any Bargain or Recompence, if the Feoffor so will.

Doct. What if no Feoffment be made, but that a Man grant to his Feoffee, that from henceforth he shall stand seised to his own use? Is not that Use changed, though there be no Recompence?

Stud. I think yes, for there was an Use *in esse* before the Gift, which he might as lawfully give away, as he might the Land if he had it in possession.[1]

Doct. And what if a Man being seised of Land in Fee, grant to another of his mere motion without Bargain or Recompence, that he from thenceforth shall be seised to the Use of the other; is not that Grant good?

Stud. I suppose that it is not good; for, as I take the Law, a Man cannot commence an Use but by Livery of Seisin, or upon a Bargain, as [or?] some other Recompence.

Stud. And as I said in the last Chapter, as I suppose, a nude or bare Grant of him that is seised of Land is not sufficient to begin an Use upon. . . .

Doct. A bare Grant may change an Use, as thou thyself agreed in the last Chapter: why then may not an Use as well begin upon a bare Grant?

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[1] "I say there is no doubt but that if I sell you my use, the use is changed from my person to you: so I understand that if I say to you, 'I give you my use in certain lands,' you have the use by such words; for the use does not pass as the land does; for land cannot pass except by livery, but a use passes by bare words." — Per *York*, Y. B. 27 H. VIII. fol. 8, pl. 22.

"*Cestui que use* may grant his use without consideration, as he may his horse or other chattell; but he cannot raise a use without good consideration. And this consideration must bee some cause or occasion meritorious, amounting to a mutuall recompence in deed or in law." Finch, Law (ed. 1636), 34. — ED.

Stud. When a Use is *in esse*, he that hath the Use may of his mere motion give it away, if he will, without Recompence, as he might the Land, if he had it in Possession; but I take it for a Ground, that he cannot so begin a Use without Livery of Seisin, or upon a Recompence or Bargain.

NOTE.

1535.

[*Reported in* 1 *Anderson*, 37, *placitum* 95.[1]]

Note by all the justices, that if one without any consideration enfeoffs another by deed to have and to hold the land to the feoffee and his heirs to his own use, [and] the feoffee suffers the feoffor to occupy the land for divers years, still the right is in the feoffee because there is an express use contained in the deed, which is enough without other consideration; the law is the same when the feoffment is to the use of a stranger and his heirs.[2]

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[1] Benl. 27, pl. 111, s. c. — Ed.

[2] Calthrop's Case, Moore, 101, pl. 247; Stephenson *v.* Layton, Owen, 40; 1 Leon. 138, pl. 188, s. c.; Mildmay's Case, 1 Rep. 176, b; Jefferys *v.* Jefferys, Cr. & Ph. 138; Scales *v.* Maude, 6 D. M. & G. 43, 52; Peckham *v.* Taylor, 31 Beav. 250; Arthur *v.* Clarkson, 35 Beav. 458; Petty *v.* Petty, 22 L. J. Ch. 1065; Langley *v.* Thomas, 26 L. J. Ch. 609; *Re* Richards, 36 Ch. D. 541; Brown *v.* Cavendish, 1 J. & Lat. 606, 637; Sledge *v.* Clopton, 6 Ala. 589; Andrews *v.* Hobson, 23 Ala. 219; Hill *v.* Den, 54 Cal. 6; Cotten *v.* Blocker, 6 Fla. 1, 8 (*semble*); Gordon *v.* Green, 10 Ga. 534, 544; Davis *v.* Moody, 15 Ga. 175 (*semble*); Massey *v.* Huntington, 118 Ill. 80; Lynn *v.* Lynn, 135 Ill. 18; Wyble *v.* McPheeters, 53 Ind. 393; Gaylord *v.* Lafayette, 115 Ind. 423, 429; Ewing *v.* Jones (Ind., 1892), 29 N. E. R. 1057; Haxton *v.* McClaren (Ind., 1892), 31 N. E. R. 48; Sherwood *v.* Andrews, 2 All. 79; Sewall *v.* Roberts, 115 Mass. 262; Von Hesse *v.* MacKaye, 62 Hun, 458; Wadd *v.* Hazleton (1892), 17 N. Y. Sup. 410; Baker *v.* Evans, Winst. Eq. 109; Pittman *v.* Pittman, 107 N. Ca. 159, 163; Blackburn *v.* Blackburn, 109 N. Ca. 488; Dennison *v.* Goehring, 7 Barr, 175; Cressman's App, 42 Pa. 147; Fellow's App, 93 Pa. 470; Stone *v.* King, 7 R. I. 358; Henson *v.* Kinard, 3 Strob. Eq. 371; Sargent *v.* Baldwin, 60 Vt. 17; Hardman *v.* Orr, 5 W. Va. 71 *Accord.*

"When the estate was by legal conveyance transferred to a person to uses, equity made no scruple in enforcing the trustee to observe the uses. The estate being actually divested out of the owner, it was not necessary to exercise the power of the court over him, and as the feoffee, &c. was a mere trustee, he was considered bound under all circumstances to observe the will of his donor, although the uses were unsupported by any consideration. Therefore a feoffment to A. to the use of B., a mere friend of the feoffor's, who paid no consideration whatever for the estate, was binding, and A. was compellable to permit B. to receive the profits." Sugd. Gilb., Introd., 45. — Ed.

ANONYMOUS.

——, 1545.

[*Reported in Brooke's Abridgment, Feoffments al Uses, pl.* 54, *March's Translation,* 95.]

A MAN cannot sell land to I. S. to the use of the vendor, nor let land to him rendring rent, *habend.* to the use of the lessor, for this is contrary to law and reason, for he hath recompence for it: and by HALES, a man cannot change a use by a covenant which is executed before, as to covenant to bee seised to the use of W. S. because that W. S. is his cosin; or because that W. S. before gave to him twenty pound, except the twenty pound was given to have the same land.[1] But otherwise of a consideration, present or future, for the same purpose, as for one hundred pounds paid for the land *tempore conventionis*, or to bee paid at a future day, or for to marry his daughter, or the like.[2]

HENRY SHARINGTON AND GABRIEL PLEDALL *v.* THOMAS STROTTON AND OTHERS.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1565.

[*Reported in Plowden,* 298.]

TRESPASS *quare clausum fregit.* The defendants justified as servants of Edward and Agnes Baynton, whose title was founded upon an indenture between Edward and his brother Andrew Baynton, whereby Andrew, being seised of the close in question, by an indenture reciting his intent that the land might continue and remain to such of the blood and name of Baynton as in the indenture should be named, for the said cause, and for the good will, brotherly love, and favor which he bore to Edward his brother and his other brothers named, covenanted and granted that he and his heirs should stand seised thereof to the use of

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[1] "*Tamen plures contra eum tempore* M. I. [1553], and that this may be good for consideration past." Brooke's note to his abridgment of this case. The case referred to by Brooke is, doubtless, Bainton's Case, Dy. 96.

[2] Ward *v.* Lambert, Cro. El. 394; 2 Roll. Abr. 783 (H.), pl. 7; 22 Vin. Abr. Uses (H.), pl. 7, s. c.; Osborn *v.* Bradshaw, Cro. Jac. 127; Crossing *v.* Scudamore, 1 Vent. 137 *Accord.*

"In a special verdict in agreement, the only point was, whether a lease for a year, made upon no other consideration than the reservation of a pepper-corn, shall operate as a bargain and sale, and make the lessee capable to take a release? *Et per Curiam,* it shall, for the reservation of a pepper-corn is a sufficient consideration to raise an use." 3 Salk. 387; 2 Vent. 35; 2 Mod. 249, s. c. — ED.

himself for life, and after his death to the use of Edward and Agnes his wife for their lives, with divers remainders over. Andrew died. Edward and Agnes claimed as legal tenants for life under the indenture and the Statute of Uses. The plaintiffs demurred upon the defendant's plea.

Fleetwood and *Wray*, for the plaintiffs, said that the matter of the bar was insufficient, and that there was no use here made by this indenture, nor was any possession conveyed to the said Edward Baynton and Agnes by the Statute of Uses upon this covenant and agreement by the indenture. For they said, first it is to be considered that Andrew Baynton, at the time of making the indenture, was seised of the said manor in fee simple, clear of all estates and interests of any stranger therein, and if he intended to make a stranger have a use in it, he ought to have taken one of these two ways to raise such use. The one is, to part with the possession, by the circumstances required by the common law, to the use intended, as to make a feoffment, to levy a fine, or to suffer a recovery of the land to the use intended; and this way the common law is satisfied, as well as the party also who has the use, for the circumstances of the common law are pursued, and the use is no more than a confidence annexed to the estate which the person parts with, and when he parts with the estate by his own consent, he may make it upon confidence, and this way the use is properly made. (The other way is, to keep the land in his hands without parting with it, and yet to do such a thing as shall make the possession to be to the use of another, and that cannot be unless the thing done imports in itself a good and sufficient consideration to make the possession be to the use of another, which shall be upon a contract, or upon a covenant or grant on consideration.) As if a man is seised of land in fee, and bargains and sells the land to another in consideration of a certain sum paid to him, or agreed to be paid at a certain day, here is a contract, and the bargainor shall be seised to the use of the bargainee by the course of the common law, because he has done an act upon consideration, that is, he has bargained the land for money; and inasmuch as he hath the money, or security for it, it is reasonable that the bargainee should have something for it, and the land he cannot have as his own, because he had not livery of seisin, and therefore reason has necessarily vested the use in him, which is but a right in conscience to have the profits, and to have the land ordered according to his will; and if the bargainor will not permit him so to have it, reason vests in the bargainee a title to compel him by the Judge of conscience to do it. (So is it in the case of a covenant upon consideration, as if I promise and agree with another that, if he will marry my daughter, he shall have my land from thenceforth, and he does so, there he shall have a use in my land, and I shall be seised to his use, because a thing is done whereby I have benefit; viz. the other has married my daughter, whose advancement in the world is a satisfaction and comfort to me, and

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[1] The author's statement of the case has been much abridged; the greater part of the defendants' argument and the marginal notes are also omitted. — ED.

therefore this is a good consideration to make him have a use in my land. So that a good consideration is always requisite to create a use *de novo* in the land of another, where there is no transmutation of the possession of the land. Then in our case here, inasmuch as Andrew Baynton was seised of the land in fee simple, and intended to raise uses in it without any transmutation of the possession, which he cannot do by the course of the common law, unless the circumstances pursued in the raising of such uses import a good and sufficient consideration to support the same, for this reason we ought to weigh the considerations here, and see what substance they have in the law. And the causes contained in the indenture are three; first, a desire which he had that the lands might come, remain, and descend to the heirs males of his body limited in the indenture; secondly, his intent that the lands should continue and remain to such of the blood and name of Baynton as are named in the indenture; thirdly, the good will and brotherly love and favor which he bore to his brother Edward Baynton, and to his other brothers. And these are all the considerations for the matter in the rehearsal, viz. that the said Andrew had no issue male, and that he was determined and resolved how his manors and lands should remain and be as well in his lifetime as after his death, is no consideration at all, but the want of issue male is the cause that moved him to resolve, and the resolution is but a demonstration of his mind, and none of them is any consideration, for the considerations are the three before mentioned. And as to the first, viz. his desire that the lands might come to the heirs males of his body, this does not seem to be any consideration to the father, for the father has no gain or advantage by it, but the heirs males of his body. And the consideration ought to be to him that is seised of the land, for if he has no recompense there is no cause why the use of his land should pass. And none of the considerations contain a recompense here, for the continuance of the land in his blood and name of Baynton is no recompense to him, nor cause worthy to raise a use; no more is the brotherly love and favor which he bore to Edward Baynton, or to his other brothers, for although these causes induce affection, yet every affection is not a sufficient cause to alter the use. For if a man grants to J. S. that in consideration of their long acquaintance, or of their great familiarity, or of their being scholars together in their youth, or upon such like considerations, he will stand seised of his land to his use, this will not change the use, for such considerations are not looked upon in the law as worthy to raise a use, because they don't import any value or recompense. For if upon consideration that you are my familiar friend or acquaintance, or my brother, I promise to pay you £20, at such a day, you shall not have an action upon the case, or an action of debt for it, for it is but a nude and barren contract, *et ex nudo pacto non oritur actio*, and there is no sufficient cause for the payment, nor is anything done or given on the one part, for you were my brother or my acquaintance before, and so will you be afterwards; so that nothing is newly done on the one part, as is requisite in contracts, and also in covenants upon consideration. As if I sell my horse to you for money or other recompense, here is a thing given on both sides, for the one gives the horse, and the other the money, or other recompense, and therefore it is a good contract. So is it in the case of a covenant upon consideration, as if I covenant with you, that if you will marry my daughter you shall have my land, or I shall be seised to your use; here is an act on both parts, for you are to marry my daughter, and for that I grant to you the use: so that there is an act done, and a cause arising newly on each part. But in the principal case there is no such thing, for the issue male of Andrew Baynton should have been his issue male, and his name and blood should have been his name and blood, and his brothers should have been his brothers, and fraternal love should have been between them, if this covenant or grant had not been made, so that all this was before the indenture or covenant, and should have been after the time of the indenture or covenant, if the same had not been made. Wherefore no new thing is here done or caused by the one side, and there is no cause here but what would have been if no such covenant or indenture had been made. But the common law requires that there should be a new cause, whereof the country may have intelligence or knowledge for the trial of it, if need be, so that it is necessary for the public weal. For livery of seisin was first invented as an act of notoriety, whereby people might have knowledge of estates, and be more able to try them, if they should be empanelled on a jury; and by the like reason when a use shall pass, there ought to be, by the common law, a contract, or a public and notorious consideration to a covenant, which may cause the country to have knowledge of the use for the better trial thereof, if it should be necessary. And such was the intention of the Parliament in 27 Henry VIII. when they made the Act that the possession should be where the use was, one of the great causes of making which Act was to remove ignorance, and that the country might know in whom the estate of the land was. And the like consideration they had in making the Act of Enrolments, which restrains estates of freehold from passing by bargain and sale, except it be by writing indented enrolled within six months. And if uses might be so easily raised by covenants upon such considerations as these here are, where no act or thing apparent is done whereof the country may have notice, it would destroy the effect of the said Statute of Uses, and would be pernicious to the public weal, and make it very difficult for the people to know who were the owners of lands and tenements. And it is to be presumed that the makers of the said Act of Enrolments did not take the common law to be so, for if they had they would have remedied it in this case, as well as they did in the case of a bargain and sale, which is much more notorious than a covenant upon such secret consideration, where no apparent act or thing is done to inform the country of the alteration of the estate in the land; and forasmuch as they did not add any remedy to it, it is an argument that they did not take the law to be that uses might pass upon such covenants without notorious considerations. But if the use had been in esse, it might well enough have passed to a stranger by the grant of *cestui que use* without any consideration; for the *cestui que use* may as well give or grant his use without consideration, as he may his horse or other chattel, and he may also devise it, but to create it *de novo* out of lands cannot be done without good consideration. And to this purpose they alleged the opinions of Read and Tremail, two of the Justices of the King's Bench, in the case of an office traversed in 21 Henry VII. and the case there put by Read, fol. 19, was also cited, viz. it was covenanted by indenture between Sir John Mordant and his wife, and one T. that the said T. should have the land to him and to his heirs of his body, and that for default of such issue, the lands should remain to Sir John Mordant and his wife in fee, and it was adjudged that he should not have any use by force of the indenture, as it is there rehearsed by Read, but they were put to their action of covenant. So here no use shall be raised upon these considerations, for they are utterly ineffectual to such purpose, and then if no use could be raised by the common law, from thence it follows that the statute does not execute any possession here, for it executes no possession but where there was a use before: for which reason the bar is not good, but the plaintiffs shall recover. And many other things were said, and many cases put to enforce this argument, which I have omitted, my design being only to show briefly the principal reasons thereof.

Bromley, and an Apprentice of the Middle Temple, for the defendants. The Apprentice divided the matter into two distinct points. First, whether the grant and agreement upon these considerations (admitting it had been without deed or writing) had been sufficient to raise the uses according to the agreement or not. Secondly, admitting the considerations to be insufficient if they had been without deed, or admitting that there were no considerations at all, if nevertheless the uses shall be raised here, inasmuch as the agreement thereunto is by deed.

And as to the first point, which contains the considerations, he said that the considerations are in number four, and each of them is several, and he made several points of them, and argued to them severally. The first is, the affection of the said Andrew Baynton for his heirs males which he should beget on the body of Frances Lee, and his provision in the estate made for their security accordingly. The second consideration is the continuance of the land in the name of Baynton, and this seems to be a good consideration to raise a use. The third consideration here is, the brotherly love, and continuance of the land in such of the blood of the said Andrew as are mentioned in the indenture, viz. his brothers. The fourth consideration is the marriage had between Edward Baynton and Agnes his wife; for the use is limited after the death of Andrew to Edward Baynton and Agnes his wife, for term of their lives.

Then as to the second point, admitting the considerations to be insufficient, or admitting that no considerations had been expressed, yet the covenant of itself, without consideration, is sufficient to raise the uses. And in order to understand this the better, let us see what advantage the party here shall have by the deed, if the deed be not sufficient to raise the uses. And it seems clearly that he shall have none. For he cannot have an action of covenant upon the deed, because there is nothing executory here; for Andrew has covenanted with Edward that he and all persons seised of the land shall from thenceforth stand and be seised to the uses limited. And if they did not stand seised, there is no default in Andrew, but in the law, for he granted that from thenceforth, viz. immediately, he would be seised, and no default can be charged in him if he did not stand seised. Nor can Edward have an action of covenant against him, for an action of covenant shall never be brought, but where it is covenanted that a thing shall be done in time to come, or that it was done in time past.

And, Sir, by the law of this land there are two ways of making contracts or agreements for lands or chattels. The one is, by words, which is the inferior method; the other is, by writing, which is the superior. And because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. As if I promise to give you £20 to make your sale *de novo*, here you shall not have an action against me for the £20, as it is affirmed in the said case in 17 Edward IV., for it is a nude pact, *et ex nudo pacto non oritur actio*. And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed, there is more time for deliberation. For when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and lastly he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying fully his good will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 Edward IV. put it thus, that I by deed promise to give you £20 to make your sale *de novo*, here you shall have an action of debt upon this deed, and the consideration is not examinable, for in the deed there is a sufficient consideration, viz. the will of the party that made the deed. And so where a carpenter, by parol without writing, undertook to build a new house, and for the not doing of it the party in 11 Henry IV. brought an action of covenant against the carpenter, there it does not appear that he should have anything for building the house, and it was adjudged that the plaintiff should take nothing by his writ: but if it had been by specialty, it would have been otherwise; and so it is there held by Thirning, *causa qua supra.* So in 45 Edward III. in debt, the plaintiff counted that a covenant was made between him and the defendant, that the plaintiff should marry the defendant's daughter, and that the defendant should be bound to him in £100, and he said that he had married his daughter; and the count was challenged, because this debt is demanded upon a contract touching matrimony, which ought to be in Court Christian; but notwithstanding this, forasmuch as he demanded a debt upon a deed, whereby it was become a lay contract, he was put to answer: but otherwise it would have been if it had been without deed, as it is there put; and 14 Edward IV. and also 17 Edward IV. are, that if it be without deed the action does not lie, because the marriage, which is the consideration, is a thing spiritual; which books are contrary to the opinion of Thorp in the said case in 22 Ass. Plow., fol. 305. So that where it is by deed, the cause or consideration is not inquirable, nor is it to be weighed, but the party ought only to answer to the deed, and if he confesses it to be his deed, he shall be bound, for every deed imports in itself a consideration, viz. the will of him that made it, and therefore where the agreement is by deed it shall never be called a *nudum pactum.* And in an action of debt upon an obligation, the consideration upon which the party made the deed is not to be inquired, for it is sufficient to say that it was his will to make the deed. And so inasmuch as in the principal case it is agreed that the uses might be raised by the deed, if there had been a consideration in it, and here there is a consideration contained in the deed, viz. the will of Andrew Baynton, which is sufficient of itself, for this reason the uses shall be raised thereby; and if this should not be sufficient to raise them, yet they should have been raised by other considerations, if they had been without deed, whereas here they are by deed, and so they shall be raised *a fortiori.* For which reasons they prayed judgment that the plaintiffs might be barred. And many other things were said, and cases put to enforce these arguments.

And after these arguments the Court took time to deliberate until Hilary Term, and from thence until Easter Term, and from thence until this present Trinity Term, in the eighth year of the reign of the present Queen, and the defendants now prayed judgment. And CORBET, Justice, said that he and all his companions had resolved that judgment should be given against the plaintiffs. For it seemed to them that the considerations of the continuance of the land in the name and blood, and of brotherly love, were sufficient to raise the uses limited. But, he said, as my Lord Chief Justice is not now present, you must move it again when he is present, and you shall have judgment. And afterwards, at another day, CATLINE, Chief Justice, being present, the Apprentice prayed judgment. And CATLINE and the Court were agreed that judgment should

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be entered against the plaintiffs, and he ordered HAYWOOD, the Prothonotary, to enter it. And the Apprentice said, may it please your Lordship to show us, for our learning, the causes of your judgment. And CATLINE said, it seems to us that the affection of the said Andrew for the provision of the heirs males which he should beget, and his desire that the land should continue in the blood and name of Baynton, and the brotherly love which he bore to his brothers, are sufficient considerations to raise the uses in the land. And where you said in your argument *naturæ vis maxima,* I say *natura bis maxima,* and it is the greatest consideration that can be to raise a use. But as to the other consideration moved in the argument, viz. of the marriage had between Edward Baynton and Agnes, the record does not prove this, nor is it so averred, and it shall not be so intended, and therefore I don't regard it, but the other causes and considerations are effectual, and those which moved us to our judgment. Wherefore judgment was given for the defendants.

NOTE, that by the civil law *nudum pactum* is defined thus: *Nudum pactum est ubi nulla subest causa præter conventionem; sed ubi subest causa, fit obligatio, et parit actionem.* Also, *Nuda pactio est tenuis et destituta tam nomine proprio, quam mutatione rerum et factorum, manens in simplici paciscentium colloquio.*

PAGE *v.* MOULTON.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1570.

[*Reported in Dyer*, 296 *a*, *placitum* 22.]

THE father, upon communication of marriage of his youngest son, promised to the friends of the wife that after his death and the death of his own wife the son should have the land to him and his heirs. And the marriage is had; but this promise is by parol only, and no consideration on the part of the woman: and the father was seised of the land in his demesne, and not in use; and this found by special verdict upon not guilty. Whether the use changes by this covenant or not was the doubt. And by the opinion of all the four justices of the bench, without open argument, the use is not altered by such naked promise; and so adjudged in next Hilary Term.[1]

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[1] This case is summarized in Crompton, Courts, f. 61 a, with the following comment: "But I collect, if any consideration had come from the side of the woman, that the use would change by this agreement because there is *quid pro quo,* although it be by parol. And Manwood, C. B. [1578–1592], says that it was adjudged that if one say to his son and a woman that he is about to marry, that in consideration of the same marriage that they shall have the said land to them two in tail, this is a good tail without deed or other circumstance, if they marry together, *ut patet apres.*" See also Crompton, Courts, f. 61 b; Shepp. Touch. (7th ed.) 508; Shepp. Epit. 1061. — ED.

TAYLOR *v.* VALE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1589.

[*Reported in Croke, Elizabeth,* 166.]

REPLEVIN. The case was upon demurrer. Vale, having a rent charge in fee, by indenture, which was enrolled within six months, giveth and granteth it to Hall, in fee, and there was no attornment.

NOTA. In truth the case was, that he for a certain sum of money giveth, granteth, and selleth the rent, &c. But it was pleaded only, that he by indenture *dedit et concessit.*

And it was ruled without any argument, that the rent without attornment passeth not, being only by way of grant, and not of bargain or sale; although the deed was enrolled. — But WRAY said, that if by indenture, in consideration of a certain sum of money, *dedit et concessit* and the deed is enrolled, this shall pass the rent without attornment, though there be no words of bargain and sale.— And the plaintiff had judgment.

CALLARD *v.* CALLARD.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1594.

[*Reported in Croke, Elizabeth,* 344.[1]]

IN THE EXCHEQUER CHAMBER, MICHAELMAS TERM, 1596.

[*Reported in Moore,* 687, *placitum* 950.[2]]

EJECTIONE FIRMÆ. The case upon special verdict was, that Thomas Callard, being seised in fee of certain land, in consideration of a marriage of Eustace, his eldest son, said these words (being upon the land): "Eustace, stand forth; I do here, reserving an estate for my own and my wife's life, give thee these my lands and Barton, to thee and thy heirs." The question was, if this was a good feoffment to Eustace.[3]

Coke, Attorney General, for the plaintiff. There are two points to be considered. First, if this shall inure as a feoffment to the use of

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[1] S. C. Popham, 47. — ED.

[2] S. C. *nom.* Tallarde *v.* Tallarde, 2 And. 64. — ED.

[3] "And it was moved by *Heale* that the plaintiff ought to be barred because it did not pass by way of estate . . . and in use it cannot pass, because that by a bare parol an use cannot be raised, and by giving my land to my son, cousin, and the like, nothing will pass without livery, for there is not consideration to raise a use." S. C. Popham, 47. — ED.

Thomas Callard and his wife for their lives, and after to the use of Eustace and his heirs; or if it be an immediate feoffment, and the reservation void. Secondly, if it be not a feoffment, if the words spoken, being in consideration of marriage, the use shall arise out of the possession of Thomas, and shall execute by the Statute of Uses, although it be without deed. First, it seemeth that it is a good feoffment, and the use shall arise upon it, although the words reservant are first; for so the court is to consider it, to make all to stand together: and in 22 Elizabeth, between Hare and Barton, it was adjudged that where one giveth lands to J. S., reserving a rent to the feoffor and his heirs, *habendum* to the feoffee and his heirs, the reservation being before the *habendum*, yet the feoffment being by indenture, it is well enough, for the law shall marshal it according to the intent. So here it shall be intended as following, and to show the intent of the parties, and not to make it all void. Secondly, admitting that the reservation is repugnant, and it can be no feoffment, yet the use shall arise and execute by parol, for it is out of the Statute of Enrolments; for this doth not hinder the raising of any uses, but only upon bargains and sales, which shall not execute by bargain and sale, but by indenture enrolled; but all other uses are at the common law, which arise upon consideration upon marriage, &c. But he did agree that a use shall not arise upon general words, or words spoken *in futuro*, but *in præsenti;* as to say, "If you do such a thing, I will give you my land." But upon words spoken advisedly, and by reason of a valuable and great consideration, and spoken *in præsenti,* as, "I do here," &c., which is an immediate gift. And he had seen the record of the case 12 Elizabeth, Dyer, 296, and the words were upon communication of a marriage to be had; "I will assure after my death Old-Acre to my son," it was ruled no use ariseth, and the reason seemeth to be that the words were spoken *in futuro;* and therefore if one saith to his son, in consideration he is his son, "I do give thee my manor of D.," this is sufficient to raise a use; for they being words spoken with advisement, and for consideration, it shall be intended a gift of the land.

GAWDY. I have not seen any book that at the common law a use shall arise by parol, but in a bargain and sale which is by reason of the consideration given for the land, and that is the reason that a fee doth pass without the word "heirs"; and in this case a use shall not arise, for it appeareth his intent was to pass the land by way of feoffment when he saith, "Stand forth; I do here give thee this land," &c., which is void by way of feoffment, for the reservation preceding it is repugnant to the livery, for it cannot inure *in futuro.* FENNER. The reservation is void, and it shall inure to Eustace presently; and a use by parol upon good consideration is sufficient. CLENCH. It shall inure as a feoffment to the son, and a use shall arise to the father, &c., and so the intent of all the parties shall be observed.

At another day it was moved again; and POPHAM said they were all resolved that judgment shall be given for the plaintiff (who claimed under Eustace); and being moved to show the reasons of their judgment, they would not. But GAWDY said he was clear of opinion that a use shall not arise by parol.[1] POPHAM and FENNER said they were

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[1] "Gawdy said, That the words as they are spoken amount to a livery, if the words are sufficient to pass the estate, but he conceived that the words are not sufficient to make the estate to pass to the said Eustace, because his intent appeareth, that Eustace was not to have the land until after the death of him and his wife, and therefore of the same effect, as if he had granted the land to the said Eustace after his death; and as an use it cannot pass, because by a bare word an use cannot be raised, as appeareth in divers reports.

"Mich. 12 & 13 Eliz., which is a good case to this purpose. But to say generally that an use cannot be raised or charged upon a perfect contract by words upon good consideration, cannot be law; and therefore it is to be considered what the law was before the statute of 27 Henry VIII. And I think that none will deny, but that by grant of land for money, before this statute an use was raised out of the same land, for a bargain and sale of land for money, and a grant of land for money is all one, and no difference between them: And is not a grant of land made in consideration of marriage of my son and daughter, as valuable as a grant of it for money? It is clear that it is, and much more valuable, as my blood is more valuable to me than my money; and therefore it is absurd to say, that the consideration of money may raise or change an use at common law, and not such a consideration of marriage.

"And in such a case at common law there was not any diversity, that the party who so grant or bargain for the one or the other considerations was seised of the land granted, or bargained in use, or possession, but that the use by the contract was transferred according to the bargain in both cases where there is a consideration: And where through all the law shall it be seen that if anything which might pass by contract, there need any other thing than the words which make the contract, as writing or the like testifying it: And that the law was so, it appeareth by the Statute of Inrolments of Bargains and Sales of Land made, 27 Henry VIII., which enacts, that no freehold, nor use thereof shall pass by bargain and sale only, unless it be by deed indented and enrolled according to the Statute; Ergo, if this statute had not been, it had passed by the bargain and sale by bare words; and inasmuch as the statute enacts this in the case of bargain and sale only, the other cases, as this case here, are as it was before at common law. And by an exception at the end of the same statute, London is as it was at common law, and therefore now lands may pass there at this day by bargain and sale, by word without deed, for it is out of the statute: And how can we say that the Statute of Uses does anything to alter the common law in this point, by any intent of the makers thereof, whereas at the same Parliament they made an especial law in the case of bargain and sale of lands. And at this day, for the lands in London, notwithstanding the Statute of Uses, the law hath been put in practice, and always holden as to the lands there to be good, if sold by bare parol as it were at common law. And I have heard it reported by Manwood, late Chief Baron of the Exchequer, that it was in question in the time of King Edward the Sixth, whether the use of a freehold of land will pass upon a contract by parol without deed in consideration of marriage; upon which all the then justices were assembled upon a doubt rising in a case, happening in the Star Chamber, and then resolved by all the justices (as he said) that it shall pass; and he said, that himself was of this opinion also: And to say, that by grant of land at common law, the use had been raised out of the possessions of the land which the grantor then had, and by it to pass to the bargainee, and that it shall not be raised and passed to another by grant of land in consideration of marriage, which is a more valuable consideration than money, is absurd and against all reason.

"And for the solemnity, uses in such cases (in respect of marriage) were the cause that they always were left as they were at common law, and not restrained as the case of bargain and sale is, which by common intendment may be made more easily and secretly, than that which is done in consideration of marriage, which is always a thing clear of a contrary opinion; and POPHAM said that, 7 Edward VI., it was adjudged that a use may rise by parol, and he could show the record of it. FENNER said it was a good feoffment, but would say no more. And it was adjudged for the plaintiff.

Whereupon the defendant brought a writ of error in the Exchequer Chamber. And here the judgment was reversed.

Note that in the Queen's Bench POPHAM, C. J. held strongly that the consideration of blood raised a use to Eustace without writing (*escript*), and so he had the possession by 27 Henry VIII. But GAWDY, FENNER, and CLENCH, JJ. were against this opinion, yet in the final judgment they agreed, because they took the words to amount to a feoffment with livery being upon the land, and the use to be to the feoffor and his wife for life, and afterwards to Eustace and his heirs.

But note that in the Exchequer Chamber EWINS, B. took the law in the same manner as the puisne judges in the Queen's Bench, and therefore was for affirming the judgment. But he was against POPHAM, C. J., that the use would not arise without a writing. BEAUMONT, J. took this to be a feoffment to Eustace in fee, and the reservation to the father and his wife to be void for repugnancy, and therefore he would have had the judgment affirmed, and he was also against POPHAM.

But the other judges, ANDERSON, C. J., PERYAM, C. B., CLARKE, B., WALMSLEY, J., and OWEN, J., all agreed that there was no feoffment executed, because the intent was repugnant to law; i. e. to pass an estate to Eustace, reserving a particular estate to himself and his wife. And it could not be a use, because the purpose was not to raise a use without an estate executed, but by an estate executed which did not take effect. And they all agreed that if this was a use, still it would not arise upon natural affection without a deed.[1]

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public and notorious, but it is not reasonable that every slight or accidental speech shall make an alteration of any use: As if a man ask of any one what he will give or leave to any of his sons or daughters for their advancement in marriage, or otherwise for their advancement, this shall be but as a bare speech of communication which shall not alter or change any use: But where there is upon the speech a conclusion of a marriage between the friends of the parties themselves, and that in consideration thereof they shall have such lands, and for such an estate, there the use shall be raised by it, and shall pass accordingly to the parties, according to the conclusion which Fennor granted." S. C. Popham, 47–49. — ED.

[1] "It was resolved that a use at this day cannot be raised without deed." Hore *v.* Dix (1660), 1 Sid. 25, 26; Foster *v.* Foster, 1 Sid. 82; Fox *v.* Wilcocks, 2 Roll. Ab. 788, pl. 2; Pierse *v.* Petfield, 2 Roll. Ab. 788, pl. 2; Jones *v.* Morley, 1 Ld. Ray. 287 *Accord.*

In Rolle's abridgment of the principal case is this addition: "And there said that 1 Ma. *per curiam accordant.* And that Wray, C. J. said that when he was sergeant [1567–1572] the opinion of all the judges was so. *Contra,* 37, 38 Eliz. Corbyn *v.* Corbyn, 2 Roll. Ab. 788, pl. 1." Corbyn *v.* Corbyn is reported, *sub nomine* Corben's Case, in Moore, 544, pl. 722, and seems to be the same case as Callard *v.* Callard.

"I would have one case showed by men learned in the law where there is a deed and yet there needs a consideration. As for parol, the law adjudged it too light to give action without consideration; but a deed ever in law imports a consideration,

FRAMPTON *v.* GERRARD.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1601.

[*Reported in* 2 *Rolle's Abridgment,* 785 (K.), *placitum* 4; 791, *placitum* 1.]

PER CURIAM. If a man covenant in consideration of blood and of the marriage of his bastard daughter to stand seised to the use of the bastard daughter, this is no consideration to raise a use, because in law she is not his daughter but *filia populi.*[1]

If a man levies a fine of certain land, and covenants by indenture in consideration of blood and the marriage of his bastard daughter that the conusee shall stand seised to the use of the daughter, although this is not a good consideration to raise a use by way of covenant, still it is sufficient upon a fine, for the will of the party is sufficient for this without consideration.

SAME'S CASE.

IN THE EXCHEQUER, TRINITY TERM, 1609.

[*Reported in* 2 *Rolle's Abridgment,* 791, *placitum* 2.]

IF A. in consideration of £100 by B. makes a feoffment in fee to B. to the use of B. and C., the son of B., this shall raise the use to C. well enough, although all the consideration was given by B.

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because of the deliberation and ceremony in the confection of it; and therefore in 8 Reginæ [Sharrington *v.* Strotton, *supra,* p. 109] it is solemnly argued that a deed should raise an use without any other consideration. . . . And yet they say that an use is but a nimble and light thing; and now contrariwise, it seemeth to be weightier than anything else; for you cannot weigh it up to raise it, neither by deed nor deed enrolled, without the weight of a consideration. But you shall never find a reason of this to the world's end in the law, but it is a reason of Chancery and it is this; that no court of conscience will enforce *donum gratuitum,* tho' the interest appear never so clearly where it is not executed or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the Chancery." Bacon, Reading on Statute of Uses (Rowe's ed.), 13, 14; 7 Spedding's Bacon (ed. 1779), 403, 404. See 2 Harvard Law Review, 18, 19. — ED.

[1] Gerrarde *v.* Worsley, Dy. 374, pl. 16, 1 And. 79, pl. 145, s. c.; Perrot's Case, 2 Roll. Abr. 785 (K.), pl. 5; Blount *v.* Blount, 2 S. Ca. L. Repos. 587.

Conf. Ivey *v.* Granberry, 66 N. Ca. 223 *Accord.* — ED.

ANONYMOUS.

[*Reported in* 2 *Rolle's Abridgment*, 78 (I.), *placita* 5, 6, 7.]

If a man in consideration that B. will marry his daughter covenants to stand seised to the use of B. and his daughter, remainder to C., this is a void remainder to C., for he is a stranger to the consideration.[1]

In consideration of certain money given by B. a man may covenant to stand seised to the use of A. for life, remainder to C. in fee; for here it is apparent that the money was given for both estates; and although A. and C. are strangers to the giving of the money, still they are sufficiently privy since it was given for them.

So, in consideration of certain moneys given by B., a man may covenant to stand seised to the use of B. for life, remainder to C. in fee, or with divers mesne remainders, for the money was given for all the estates. Cit. Plow. 307 *b*.

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[1] Paget's Case, 1 Rep. 154; Moo. 193, pl. 343; 1 Leon. 194, pl. 279, s. c.; Wiseman *v.* Barnard, 2 Rep. 15; Moo. 195, pl. 344; And. 140, pl. 191, s. c.; Fox *v.* Wilcocks, 2 Roll. Abr. 733 (H.), pl. 4; Smithy *v.* Risley, Cro. Car. 529; Jones, 418, pl. 6, s. c.; Bulkley's Case, Ley, 57, 58; Whaley *v.* Tankard, 2 Lev. 52, 54; Nugent *v.* Hancock, 22 Vin. Abr. Uses (H.), pl. 13 *Accord.*

Cestui que use is a stranger, unless (1) nearly related by blood to the covenantor, e. g. a son or grandson (Bonde *v.* Edmonds, 2 Roll. Abr. 782, Uses (H.), pl. 3; 2 Roll. Abr. 785, Uses (K.), pl. 6, 8); a daughter (2 Roll. Abr. 784, Uses (I.), pl. 2); a brother (Sharington *v.* Strotton, *supra*, p. 109); a nephew (Englefield's Case, 7 Rep. 11 *b*); and the like; or unless (2) connected by marriage with the covenantor, e. g. wife of covenantor (Bedell's Case, 7 Rep. 40; Burgoine *v.* Burgoine, 22 Vin. Abr. Uses (N.), pl. 10; Co. Lit. 112 *a*); husband of covenantor's daughter (2 Roll. Abr. 784, Uses (I.), pl. 2); wife of covenantor's son (Anon., 13 Rep. 48; Sheffield's Case, 13 Rep. 49; Corbyn *v.* Corbyn, 2 Roll. Abr. 784, Uses (I.), pl 4; Bould *v.* Winston, Cro. Jac. 168; Noy, 125, s. c.); wife of covenantor's brother (2 Roll. Abr. 783, Uses (I.), pl. 1); and the like.

The *cestui que use* need not be the covenantee. Bedell's Case, *supra*; Harpur's Case, 11 Rep. 24 *b*; Buckler *v.* Symons, 2 Roll. Abr. 788, Uses; Winch, 61, s. c. In Co. Lit., *supra*, the learned commentator says: A man may by his deed covenant with others to stand seised to the use of his wife. . . . But a man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her, for the reason that Littleton here yieldeth (viz. that 'his wife and he are but one person in the law')." See to the same effect Gilb. Trusts, 52, 54. — Ed.

PYE, DUBOST, } Ex parte.

In Chancery, before Lord Eldon, C., April 26, 29, May 27, June 13, 28, 1811.

[*Reported in* 18 *Vesey*, 140.]

William Mowbray, by his will dated the 10th of April, 1806, giving his wife the residue of his property after payment of his debts, except the sums after mentioned, among other legacies, gave as follows: "I give and bequeath the sum of £4,000 sterling to Louisa Hortensia Garos, daughter of John Louis Garos, formerly of Berwick Street, Westminster; the like sum of £4,000 to Emily Garos, her sister, and £4,000 to Julia Garos, her other sister; and in case of the death of one of the three, I desire that the legacy may be divided equally betwixt the two surviving sisters; and in case of the death of two of them, I desire the whole £12,000 may be paid to the surviving sister."

The testator also gave to John Louis Garos £600; and "to Marie Genevieve Garos, his wife, the sum of £2,500 sterling for her own use, and over which her husband is not to have any power: he having lived abroad for many years, and she in this country, and no correspondence having passed between them during that time. Her own receipt shall be a sufficient authority to my executors for paying her the above legacy."

The testator died on the 8th of June, 1809. His widow became a lunatic; the petitioner, Pye, was the committee under the commission, and, upon her death, took out administration to her, and administration *de bonis non* to the testator.

The Master's report stated that, by a letter written by the testator to Chistopher Dubost, in Paris, on the 25th of November, 1807, the testator authorized him to purchase in France an annuity of £100 for the benefit of the said Marie Genevieve Garos for her life, and to draw on him for £1,500 on account of such purchase; and under that authority Dubost purchased an annuity of that value; but that, as she was married at the time, and also deranged, the annuity was purchased in the name of the testator; and the testator sent to Dubost, by his desire, a power of attorney, authorizing him to transfer to Marie Genevieve Garos the said annuity, dated the 10th of June, 1808.

The report further found, upon the affidavit of Dubost and the copy of the deed, that the first intimation he received of the death of the testator, who died in June, 1809, was in November, 1809; and that, in ignorance of such death, Dubost, on the 21st of October, 1809, exercised the power vested in him, by executing to Marie Genevieve Garos, her late husband being then dead, and she of sound mind, a deed of gift of the said annuity; and the Master found that, by the law of France, if an attorney be ignorant of the death of the party who has given the power of attorney, whatever he has done while ignorant of such death is valid. The Master, therefore, stated his opinion that the annuity was no part of the personal estate of William Mowbray.

The first[1] petition prayed that so much of the report as certifies the French annuity to be no part of the testator's personal estate may be set aside; and that it may be declared that the said annuity is part of his personal estate.

Sir Arthur Piggott, *Mr. Richards*, *Mr. Wingfield*, *Mr. Horne*, and *Mr. Wear*, for different parties, in support of the first petition. The French annuity being purchased in the testator's name, and no third person interposed as a trustee, the interest could not be transferred from him without certain acts, which were not done at the time of his death. It was therefore competent to him, during his life, to change his purpose, and to make some other provision for this lady by funds in this country; conceiving, perhaps, that she might return here. The authority given to purchase this annuity could not have been enforced against him during his life by a person claiming as a volunteer; nor can it be established against his estate after his death, the act which would have given the benefit of it against the personal representative not having been completed. Where a question is to be decided by a foreign law, the first step is an inquiry by the Master to ascertain what is the law of that country.

Sir Samuel Romilly and *Mr. Bell*, *contra*.

THE LORD CHANCELLOR [ELDON]. The other question involves not only the construction of the French law, and the point whether that has been sufficiently investigated, but further, whether the power of attorney amounts here to a declaration of trust. It is clear that this court will not assist a volunteer; yet, if the act is completed, though voluntary, the court will act upon it. It has been decided that, upon an agreement to transfer stock, this court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more; and the court will act upon it.

June 13th. THE LORD CHANCELLOR [ELDON]. These petitions call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the court. With regard to the French annuity, the Master has stated his opinion as to the French law, perhaps without sufficient authority, or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case; but it is not necessary to pursue that, as upon the documents before me it does appear that though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant.[1]

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[1] Only so much of the case is given as relates to the petition — ED.

Under this judgment, the order was pronounced dismissing the first petition.

Father & son had disagreement. Referred matter to arbitrators who decided that father should pay son's debts & that son should give bond to be settled in hands of arbitrators not to be delivered with years without consent of arbitrators. Later father told arbitrators that his purpose was to secure the good behavior of the son & that son had behaved. This was a bill against the exors of the arbitrators for the delivery of the bill. Held, granted.

FLOWER v. MARTEN.

IN CHANCERY, BEFORE LORD COTTENHAM, C., APRIL 6, 8, 1837.

[*Reported in 2 My'ne & Craig, 459.*]

THIS bill was filed by Sir James Flower for the delivery up of a bond for £1,500, which had been given by him to his father, under the following circumstances.

The plaintiff, the son of Sir Charles Flower, became, in the year 1822, embarrassed in his circumstances, and a misunderstanding having, in consequence, taken place between him and his father, the latter applied to the defendants, Messrs. Muspratt and Marten, his old and intimate acquaintances, to interfere between himself and the plaintiff, and to assist in adjusting the differences then existing between them. This duty they accordingly undertook, after exacting from both parties (the father and son) a pledge and promise that they would abide by and perform whatever course Messrs. Muspratt and Marten should recommend. Having thus undertaken the mediation, they proceeded to investigate the affairs of the plaintiff, and they embodied the result of their determination in a letter addressed to Sir Charles Flower, dated the 28th of November, 1822, in which, after recommending that Sir Charles Flower should discharge his son's debts, and that any available funds of the plaintiff should be applied towards the payment of the money advanced, they recommended and determined as follows: —

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[1] The validity of a gratuitous declaration of trust is now generally admitted. Wheatley *v.* Purr, 1 Keen, 551; Smith *v.* Warde, 15 Sim. 56 (*semble*); Thorpe *v.* Owen, 5 Beav. 224; Drosier *v.* Brereton, 15 Beav. 221; Gray *v.* Gray, 2 Sim. N. S. 273; Steele *v.* Waller, 28 Beav. 466; Forbes *v.* Forbes, 30 Law Times, 176 (*semble*); Evans *v.* Jennings, 6 W. R. 616; Gee *v.* Liddell, 35 Beav. 621; Jones *v.* Locke, 1 Ch. Ap. 23 (*semble*); Armstrong *v.* Timperon, 24 L. T. Rep. 275; Pethybridge *v.* Burrow, 53 L. T. Rep. 5; Johnstone *v.* Mappin, 64 L. T. Rep. 48; Willcocks *v.* Hannyngton, 5 Ir. Ch. 38; Kelly *v.* Walsh, 1 L. R. Ir. 275; Tiffany *v.* Clarke, 6 Grant, Ch. (Can.) 474; Linton *v.* Brown, 20 Fed. Rep. 455; Crompton *v.* Vasser, 19 Ala. 259, 266 (*semble*); Sayre *v.* Weil (Ala.), 10 S. R. 546; Webb's Estate, 49 Cal. 541 (*semble*); Cotten *v.* Blocker, 6 Fla. 1, 8 (*semble*); Dresser *v.* Dresser, 46 Me. 48 (*semble*); Cobb *v.* Knight, 74 Me. 253; Barkley *v.* Lane, 6 Bush, 587; Tanner *v.* Skinner, 11 Bush, 120; Smith *v.* Darby, 39 Md. 268; Taylor *v.* Henry, 48 Md. 550, 560; Gerrish *v.* New Bedford Inst., 128 Mass. 159; Alger *v.* North End Bank, 146 Mass. 418; Smith *v.* Speer, 34 N. J. Eq. 336; Millspaugh *v.* Putnam, 16 Abb. Pr. 380; Taylor *v.* Kelly, 5 Hun, 115; Boone *v.* Citizens' Bank, 21 Hun, 235; Terry *v.* Bale, 1 Dem. 452; Westlake *v.* Wheat, 43 Hun, 77; Fowler *v.* Bowery Bank, 47 Hun, 399; Phipard *v.* Phipard, 55 Hun, 433; Macy *v.* Williams, 55 Hun, 490 (affirmed 125 N. Y. 767); McArthur *v.* Gordon, 126 N. Y. 597 (*semble*); *Re* Walker, 17 N. Y. Sup. 666; Duly *v.* Duly (Ohio), 3 W. L. M. 42; Crawford's App., 61 Pa. 52; Dickerson's App., 115 Pa. 198; *Re* Smith's Estate, 144 Pa. 428; Ray *v.* Simmons, 11 R. I. 266; O'Brien, 11 R. I. 419; Atkinson, 16 R. I. 413; Clarke *v.* Deveaux, 1 S. Ca. 172; Reilly *v.* Whipple, 2 S. Ca. 277; Gadsden *v.* Whaley, 14 S. Ca. 210; Pope *v.* Savings Bank, 56 Vt. 284 (*semble*).

But see, *contra*, Woodland *v.* Newhall, 31 Fed. Rep. 434, 440 (*semble*); Yarborough *v.* West, 10 Ga. 471; Pittman *v.* Pittman, 107 N. Ca. 159; Thompson *v.* Branch, Meigs, 390. (Compare Lowry *v.* McGee, 3 Head, 269; Harris *v.* Union Bank, 1 Coldw. 152, 154–155.)

See further Price *v.* Price, *infra*, p. 168, n. 1. — ED.

In the following cases the language was considered not to import an intention on the part of the speaker or writer to make himself a trustee: *Re* Webb, 49 Cal. 541; Marshall *v.* Strange (Ky. 1888), 9 S. W. Rep. 250.

"That your son shall give you his bond, bearing date from the last payment of any sum in the aforesaid statement, for £4,500, in satisfaction of pecuniary claims upon him, including the payments in the said statement to be yet made, such bond to be payable on demand, with interest at £4 per cent per annum, but the bond is to remain in our hands, and not to be acted upon for the recovery of principal or interest within six years from the date of the bond, without the consent in writing of us, or of the survivor of us; and, moreover, that in case we or the survivor of us shall at any time within six years, by a memorandum in writing, direct the bond to be delivered up and cancelled, such cancellation, or an order from us or the survivor of us for that purpose, shall operate as a total extinguishment of the debt, both as to principal and interest."

A bond was accordingly executed by the plaintiff to his father, in the penalty of £9,000, subject to the following condition: "Whereas, the said Sir Charles Flower has agreed to accept from the said James Flower, his son, the above-written bond or obligation, with a condition for payment of £4,500 and interest, as hereinafter mentioned, in full satisfaction of all claims and demands upon him, and the said James Flower has agreed to enter into and execute such bond accordingly, but under the special understanding and agreement of both parties, and particularly of Sir Charles Flower, that the said bond shall remain in the hands of Robert Humphrey Marten and John Petty Muspratt, of the city of London, merchants, and shall not be acted upon for the recovery of principal or interest within six years from the date thereof, without the consent in writing of them, or of the survivor of them; and, moreover, that in case they or the survivor of them shall at any time within six years, by a memorandum in writing, direct the said bond to be cancelled, such memorandum or cancellation shall operate as a total extinguishment of the debt, both as to principal and interest." A condition then followed for rendering the bond void, on repayment of the £4,500 in 1823.

The bond, when executed, was delivered over to Mr. Marten and Mr. Muspratt, and remained in their hands uncancelled at the death of Sir Charles Flower, in 1834. No part either of the principal or interest appeared to have been paid to the obligee in his lifetime.

This bill was filed against the executors of Sir Charles, and Mr.

Marten and Mr. Muspratt, by the plaintiff (Sir James Flower), to obtain the opinion of the court, and the plaintiff, by the bill, insisted that the purposes for which the bond had been given had been satisfied, and prayed that it might be delivered up.

Mr. Muspratt and Mr. Marten were examined on behalf of the plaintiff, who deposed to the above facts, and particularly that Sir Charles, in conversation held after the arrangement, expressed himself satisfied with the conduct of the plaintiff, and that "his son's conduct was everything that he could wish." It was also proved to have been distinctly understood by the trustees, at the time the bond was executed, that it was taken by Sir Charles from his son "as a sort of security for the plaintiff's future good conduct and economy, and that it was not to be acted upon or enforced if the plaintiff's mode of living and behavior were satisfactory to his father; and with those views they recommended the bond to be taken and deposited with them."

It appeared that an affectionate intercourse subsisted between them until the death of Sir Charles, and by his will the plaintiff was made tenant for life of the principal part of his very large property.[1]

Mr. Wigram and *Mr. Fisher*, for the plaintiff.

Sir W. Horne and *Mr. James*, for the executors of Sir Charles Flower's will.

Mr. Geldart, for Messrs. Marten and Muspratt.

THE LORD CHANCELLOR. In this case a large sum of money was advanced by the plaintiff's father for the purpose of paying off the debts of his son. That advance may either have been made by way of a gift, or as a loan to the son. The taking a security for the amount is, *primâ facie*, evidence that the father meant originally to treat the sum as a debt; but that presumption is capable of being explained away and rebutted; and even if the sum constituted a debt in the first instance, the debtor, according to the authorities, is at liberty to show that the creditor subsequently altered his intention and treated it as a gift.

In the present case, both circumstances concur. Upon the evidence of the gentlemen with whom the bond was deposited, I cannot suppose that the father intended to treat the money, which he advanced on his son's behalf, as being, at all events, a debt. He plainly meant to keep alive the security for a time, as a means of controlling and influencing the conduct of his son; and that was the main object of the instrument, to which the securing of the sum advanced was only collateral and subsidiary; but it does not appear from the testimony of the referees that the father ever actually dealt with the bond as creating a debt, or as forming a part of his assets.

With respect to the six years during which the referees had the power of entirely discharging the obligation by executing a memorandum to that effect, the father had delegated that discretion to them as two of his confidential friends; and the discretion was wholly inconsistent with the notion that the bond was given merely, or principally, to secure the repayment of a sum of money. Within that period, events had taken place which, as the referees themselves state, induced them to think that the claim was no longer available: the father and son were completely reconciled and united; and the conduct of the son throughout had been highly satisfactory to the father. Now, if the events took place which would render it the duty of the referees to exercise the trust reposed in them by indorsing upon the bond the proposed memorandum, of which the effect would be to avoid the security and discharge the debt at law, the situation of the plaintiff cannot, in a court of equity, be affected by their omission to do that which they ought, under the circumstances, to have done.

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[1] The statement of facts, as given in 6 L. J. Eq. N. S. 167, has been substituted for that in the report by Mylne & Craig, and the arguments of counsel have been omitted. — ED.

That, of itself, would be a sufficient ground on which to rest the plaintiff's title to relief. But there is also another ground, to be deduced from the principles which were distinctly laid down in the cases of Wekett *v.* Raby[1] and Eden *v.* Smyth;[2] namely, that whether this obligation constituted a debt or not, either originally or during the continuance of the prescribed period, the father subsequently did not intend that it should be treated as a debt due from his son to his own estate, and be put in force accordingly. Nearly six years elapsed after these two gentlemen ceased, according to the letter of the condition, to have any authority or control; nevertheless, throughout the whole of that period the father left the bond in their hands, and treated his son in a manner expressive of his entire reconciliation and satisfaction with him, and showing that, the object of the transaction having been attained, he understood and considered the instrument as no longer subsisting and in force.

Both points seem to me to concur in the present case. Upon the evidence, I think that the bond was not, in the first instance, intended to operate as a debt at all events.[3] At any rate, the father, by his subsequent conduct and his mode of dealing, showed that he did not mean it should now so operate, but that, in fact, he abandoned any claim in respect of it.[4]

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[1] 2 Bro. P. C. 386, Toml. ed.

[2] 5 Ves. 341.

[3] A collateral agreement that a bond or other specialty shall not, in a certain event, be enforceable, will, upon the happening of the event, warrant an injunction against an action at law, or it may be pleaded as an equitable defence to such an action, and is of course a bar to a suit in equity. Ward *v.* Lant, Prec. Ch. 182; Platamone *v.* Staple, G. Cooper, 250; Major *v.* Major, 1 Drew. 165; Peace *v.* Haines, 11 Hare, 151, 153; Feltz *v.* Walker, 49 Conn. 93; Robson *v.* Jones, 3 Del. Ch. 51, 90; Nichol *v.* Nelson, 18 N. Y. W. D. 210; Franc *v.* Dickinson, 52 Hun, 373 (*semble*); Long *v.* Cross, 5 Jones, Eq. 323; Hartzell *v.* Reiss, 1 Binn. 289; Bown *v.* Morange, 108 Pa. 69. — ED.

[4] A creditor may extinguish his claim, without consideration, either by a release under seal, or, in the case of a common law or mercantile specialty, by a surrender or destruction of the instrument of obligation. But a gratuitous parol forgiveness of

Under such circumstances, the authority of the cases referred to sufficiently establishes the jurisdiction of the Court to deal with the instrument in question. There must, therefore, be a decree that the bond be delivered up to be cancelled.

MORGAN *v.* MALLESON.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JULY 26, 28, 1870.

[*Reported in Law Reports,* 10 *Equity,* 475.]

THE following memorandum was given by John Saunders, the testator in the cause, to his medical attendant, Dr. Morris: —

"I hereby give and make over to Dr. Morris an India bond, No. D., 506, value £1,000, as some token for all his very kind attention to me during illness.

"Witness my hand, this 1st day of August, 1868,
(Signed) "JOHN SAUNDERS."

The signature was attested by two witnesses, and the memorandum was handed over to Dr. Morris, but the bond, which was transferable by delivery, remained in the possession of Saunders. There was no consideration for it.

Saunders died more than a year afterwards, having by his will bequeathed the residue of his personal estate to charities. A suit was instituted for the administration of his estate, and a summons was taken out by the Attorney General on behalf of absent charities for the direction of the court on the question whether this memorandum was or was not a valid declaration of trust in favor of Dr. Morris.

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a debt is inoperative, both in equity and at law. Tufnell *v.* Constable, 8 Sim. 69; Cross *v.* Sprigg, 6 Hare, 552; Peace *v.* Haines, 11 Hare, 151; Knapp *v.* Burnaby, 8 W. R. 305; Taylor *v.* Mannors, 1 Ch. Ap. 48, 55 (*semble*); Strong *v.* Bird, 18 Eq. 315 (*semble*); *Re* Milnes (Ch. D.), 53 L. T. Rep. 534; Westmoreland *v.* Porter, 75 Ala. 452; Robson *v.* Jones, 3 Del. Ch. 51; Adamson *v.* Lamb, 3 Blackf. 446; Denman *v.* McMalin, 37 Ind. 241; Webber *v.* Couch, 134 Mass. 26; Irwin *v.* Johnson, 36 N. J. Eq. 347 (overruling Leddel *v.* Starr, 20 N. J. Eq. 274); Traphagen *v.* Voorhees, 44 N. J. Eq. 21 (*semble*); Tulane *v.* Clifton, 47 N. J. Eq. 351; Whitehill *v.* Wilson, 3 Pen. & W. 405, 413; Kennedy *v.* Ware, 1 Barr, 445 (discrediting Wentz *v.* De Haven, 1 S. & R. 312); *Re* Campbell, 7 Barr, 100, 101; McGuire *v.* Adams, 8 Barr, 286; Kidder *v.* Kidder, 33 Pa. 268; Horner's App., 2 Pennyp. 289; Ewing *v.* Ewing, 2 Leigh, 337.

139 Mich
50 N.Y.E.
9 R.I. 9
179 Pa. 30

But see, *contra*, Green *v.* Langdon, 28 Mich. 221; Gray *v.* Barton, 55 N. Y. 68; Ferry *v.* Stephens, 66 N. Y. 321; Carpenter *v.* Soule, 88 N. Y. 251; in which cases it was held that a written receipt of payment, though gratuitous, extinguishes the claim where extinguishment by surrender is impracticable; e. g. where the claim is not in writing, or where it is desired to forgive only a part of a bond or other specialty.

194 Pa. 46
[illegible]

See Eden *v.* Smith, 5 Ves. 341 (explained in Reeves *v.* Bryan, 6 Ves. 516); Yeoman *v.* Williams, 1 Eq 184. — ED.

Mr. Wickens, for the Attorney General.

Mr. Jessel, Q. C., and *Mr. Speed*, for Dr. Morris.[1]

July 28. LORD ROMILLY, M.R. I am of opinion that the paper writing signed by Saunders is equivalent to a declaration of trust in favor of Dr. Morris. If he had said, "I undertake to hold the bond for you," or if he had said, "I hereby give and make over the bond in the hands of A.," that would have been a declaration of trust, though there had been no delivery. This amounts to the same thing; and Dr. Morris is entitled to the bond, and to all interest accrued due thereon.[2]

RICHARDS *v.* DELBRIDGE.

IN CHANCERY, BEFORE SIR G. JESSEL, M.R., APRIL 16, 1874.

[*Reported in Law Reports,* 18 *Equity,* 11.]

DEMURRER. The bill, filed by Edward Bennetto Richards, an infant, by his next friend, stated that John Delbridge, deceased, was possessed of a mill, with the plant, machinery, and stock in trade thereto belonging, in which he carried on the business of a bone manure merchant, and which was held under a lease dated the 24th of June, 1863.

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[1] The arguments of counsel are omitted. — ED.

[2] Bridge *v.* Bridge, 16 Beav 315, 326, 327; Trimmer *v.* Danby, 25 L. J. Ch. 424; Connor *v.* Trawick, 37 Ala. 289; Peters *v.* Fort Madison Co, 72 Iowa, 405. Young *v.* Young, 80 N. Y. 422, *Re* Crawford, 113 N. Y. 560, Flanders *v* Blandy, 45 Oh. St. 108 *Contra.* 137 N.Y. 215

In Warriner *v.* Rogers, L. R. 16 Eq. 340, Bacon, V. C. said, p 348 "If it were necessary, but I do not think it is, to go further into the case of Morgan *v.* Malleson, I should require to examine it and consider the facts much more closely than I now think it necessary to do in order to determine what the real bearing of that case is. I am strongly inclined to believe that there must be some imperfection in the report of it, because what staggers me most is to find that the decision as it stands would seem to establish that if a man writes a letter to say, 'I have given' a bank-note, or an Indian bond, or anything else, 'to A. B.,' and no more, and retains the bank-note or bond and the memorandum in his own possession, that letter has a valid operation as between himself and A. B. If that were all that appeared in the case, I should certainly consider such a letter to be a mere nullity." — ED.

A deed of gift of a chattel vests the title in the donee without delivery Y. B 7 Ed. IV. f. 20, pl. 21; Butler and Baker's Case, 3 Rep. 26 b; Shep Touch. 285; Thompson *v.* Leach, 2 Vent. 198, 203; Wankford *v.* Wankford, 1 Salk. 299, 301; Irons *v.* Smallpiece, 2 B. & Al. 551; Ward *v* Audland, 8 Beav. 201; Hope *v.* Harman, 11 Jur. 1097, Lunn *v.* Thornton, 1 C B. 379, 381; Cochrane *v.* Moore, 25 Q. B. Div. 57, 67, 72; McCutchen *v.* McCutchen, 9 Port. 650; Banks *v.* Marksberry, 3 Litt. 275, Baxter *v.* Bailey, 8 B. Mon. 336, Bunn *v.* Winthrop, 1 Johns. Ch. 329; Fulton *v.* Fulton, 48 Barb. 581, 590; Duncan *v.* Self, 1 Murph. 466, Jaggers *v.* Estes, 3 Strob. Eq 379; Carries *v.* Marley, 2 Yerg. 582; Hillebrant *v.* Brewer, 6 Tex. 45, 51; Hogue *v* Bierne, 4 W Va. 658 (*semble*).

But see, *contra,* McWillie *v.* Van Vacter, 35 Miss. 428. — ED.

That on the 7th of March, 1873, John Delbridge indorsed upon the lease and signed the following memorandum: —

Grandfather

"7th March, 1873. This deed and all thereto belonging I give to Edward Bennetto Richards from this time forth, with all the stock in trade.

"JOHN DELBRIDGE."

That the plaintiff was the person named in the memorandum, and the grandson of John Delbridge, and had then for some time assisted him in the business; that John Delbridge, shortly after signing the memorandum, delivered the lease on his behalf to Elizabeth Ann Richards, the plaintiff's mother, who was still in possession thereof.

That John Delbridge died in April, 1873, having executed several testamentary instruments which did not refer specifically to the said mill and premises, but gave his furniture and effects, after his wife's death, to be divided among his family.

Prof.

of

That the testator's widow, Elizabeth Richards, took out administration to his estate, with the testamentary papers annexed.

The bill, which was filed against the defendants, Elizabeth Delbridge, Elizabeth Ann Richards, and the testator's two sons, who claimed under the said testamentary instruments, prayed a declaration that the indorsement upon the lease by John Delbridge and the delivery of the lease to Elizabeth Ann Richards created a valid trust in favor of the plaintiff of the lease and of the estate and interest of John Delbridge in the property therein comprised, and in the good will of the business carried on there, and in the implements and stock in trade belonging to the business.

The defendants demurred to the bill for want of equity.

Mr. Fry, Q. C., and *Mr. Phear*, in support of the demurrer.[1]

Mr. W. R. Fisher, (*Mr. Southgate*, Q. C., with him,) for the plaintiff.

SIR G. JESSEL, M.R. This bill is warranted by the decisions in Richardson *v.* Richardson and Morgan *v.* Malleson; but, on the other hand, we have the case of Milroy *v.* Lord, before the Court of Appeal, and the more recent case of Warriner *v.* Rogers,[2] in which Vice Chancellor Bacon said: "The rule of law upon this subject I take to be very clear, and with the exception of two cases which have been referred to" (Richardson *v.* Richardson and Morgan *v.* Malleson), "the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust — the indispensable thing — I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest."

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[1] The arguments of counsel have been omitted. — ED.

[2] Law Rep. 16 Eq. 340, 348.

The two first mentioned cases are wholly opposed to the two last. That being so, I am not at liberty to decide the case otherwise than in accordance with the decision of the Court of Appeal. It is true the judges appear to have taken different views of the construction of certain expressions, but I am not bound by another judge's view of the construction of particular words; and there is no case in which a different principle is stated from that laid down by the Court of Appeal. Moreover, if it were my duty to decide the matter for the first time, I should lay down the law in the same way.

The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.

The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said, "I give or grant certain property to A. B." Thus, in Morgan *v.* Malleson the words were, "I hereby give and make over to Dr. Morris an India bond"; and in Richardson *v.* Richardson the words were, "grant, convey, and assign." In both cases the judges held that the words were effectual declarations of trust. In the former case, Lord Romilly considered that the words were the same as these: "I undertake to hold the bond for you"; which would undoubtedly have amounted to a declaration of trust.

The true distinction appears to me to be plain, and beyond dispute; for a man to make himself a trustee, there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise.

In Milroy *v.* Lord, Lord Justice Turner, after referring to the two modes of making a voluntary settlement valid and effectual, adds these words: "The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust." //

It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord Romilly and of Vice Chancellor Wood were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases in which words of present transfer for valuable consideration are held to be evidence of a contract which the court will enforce. Applying that reasoning to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature, which this court will not enforce; so that, following out the principle even of those cases, you come to the same conclusion.

I must, therefore, allow the demurrer, and, though I feel some hesitation, owing to the conflict of the authorities, I think the costs must follow the result.[1]

COLMAN *v.* SARREL.

IN CHANCERY, BEFORE LORD THURLOW, C., NOVEMBER 10, 13, 16, 1789.

[*Reported in* 1 *Vesey, Jr.*, 50.]

GEORGE DAVY, 11th June, 1767, assigned by deed to trustees £1,000 three per cent bank annuities in trust for Joan Sarrel for life, in case she should survive him; and after her death for such child or children of her, and in such proportions, as she should appoint; with a proviso, if she should live in any other place than that in which the grantor should reside, to be void, but not otherwise. The deed contained a covenant by him, that, if he should survive her, he would pay the interest and dividends to such of her children, and in such proportions, as she should appoint the principal. At the time of the deed, his wife and her husband were living. The consideration expressed in the deed was Consi Vl for some satisfaction for the injuries the grantee had received from the wife of the grantor. No actual transfer of the stock ever took place. Joan Sarrel, having survived the grantor, appointed by will £600 of this fund to one child, and £200 each to two others. Colman, as executor of the grantor, filed a bill to have the deed delivered up, as being voluntary. The children filed a cross-bill to have the deed carried into execution by a decree upon the executor to transfer the stock to their trustees. By the evidence of plaintiff in the original bill it appeared that the witness had gone into a room, in which he found Davy, his wife, and Mrs. Sarrel; that Mrs. Davy had her hand to her head as if she had received a blow, and complained to the witness that her husband had beaten her; that at the time of the execution of the deed Mrs. Sarrel had threatened to kill him, had pursued him through the town with a knife, and had said she had purchased a shroud for him. In 1770, he applied for a *supplicavit* against her, and she was bound accordingly. He resisted this deed in his life, when threatened with a suit upon it.

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[1] Bridge *v.* Bridge, 16 Beav. 315; Warriner *v.* Rogers, L. R. 16 Eq. 340, per Bacon, V. C. (*semble*); Pethybridge *v.* Burrow (C. A.), 53 L. T. Rep. 5 *Accord.* — ED.

Mr. Mansfield and *Mr. Grimwood*, for the plaintiffs in the cross-bill. It is not a mere voluntary agreement, but a voluntary gift of stock, not to take place till after his death; and therefore they are in the same situation as legatees of stock. The consequence is, that his executors at his death became trustees under this voluntary gift for the persons to whom it is given; as they would have been if he had given it by his will. Then there is a covenant in the deed which creates a debt; and the party comes to be paid out of the assets as for any other debt. Either an action of debt or covenant would lie; but they come into this Court in the common way. It is not a case for making perfect a defective voluntary agreement; but here is a deed under seal conveying to trustees. It is an equitable gift instead of a legal one.

Lord Chancellor. If you have it at law, there is an end; if not, the question is, whether you can have a voluntary agreement executed in equity.[2] The difficulty is to show a case where any voluntary gift has been executed in equity. You are now upon a question whether a court of equity will set up a deed you cannot proceed upon at law.[3]

Solicitor General and *Mr. Cooke*, for defendants in the cross-bill.

Lord Chancellor. If you can bring an action, you may. The covenant seems to be but in aid of the form of the transfer. The only case coming near it is that in Vesey, but it is not so clear a case that a court of equity will take it out of the hands of a jury. Where a deed is not sufficient in truth to pass the estate out of the hands of the conveyer, but the party must come into equity, the court has never yet executed a voluntary agreement. To do so would be to make him who does not sufficiently convey, and his executors after his death, trustees for the person to whom he has so defectively conveyed; and there is no case where a court of equity has ever done that. Whenever you come into equity to raise an interest by way of trust, you must have a valuable, or at least a meritorious consideration. Nothing less will do.[4]

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[1] Lord Thurlow dismissed the original bill. The arguments and opinion relating thereto, as well as the discussion of the question of costs, are omitted. — Ed.

[2] Equity will not decree performance of such an agreement. Tatham *v.* Vernon, 29 Beav. 604. — Ed.

[3] The rest of the argument of the plaintiff is omitted. Villars *v.* Beaumont, 1 Vern. 100; Boughton *v.* Boughton, 1 Atk. 625, 1 Vern. 365; Lechmere *v.* Earl of Carlisle, 3 P. Wms. 222; Williamson *v.* Codrington, 1 Ves. 514; Watts *v.* Bullas, 1 P. Wms. 60, were cited. — Ed.

[4] 1 Fonb. Treat. Eq. 41; Ellison *v.* Ellison, 6 Ves. 656.

The decree was, "that the original bill should be dismissed without costs; that the cross-bill should be retained twelve months, during which time the plaintiffs in it should be at liberty to bring an action upon giving security, to be approved by a master, to answer the costs of it; on non-compliance with these terms, the bill at the end of the year to stand dismissed, with costs."

The plaintiffs in the cross-bill did nothing till the 1st November, 1790, when they applied to have the time for bringing the action enlarged for six months; which the Lord Chancellor thought reasonable, and ordered. Upon that order they commenced the action without giving security for the costs. Upon the 11th, Mr. Mitford moved to amend the minutes of the last order by inserting the terms contained in the decree; and the Lord Chancellor granted the motion, declaring he meant not to discharge the terms when he enlarged the time.

SLOANE *v.* CADOGAN.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., DECEMBER, 1808.

[*Reported in Sugden, 3 Vendors and Purchasers* (10*th ed.*), *Appendix*, 66.]

WILLIAM B. CADOGAN, being entitled to an equitable reversionary interest in one fourth share of a fund of £20,000, by an indenture bearing date the 26th May, 1798, assigned his interest to four trustees, upon trust, first, for himself for life; secondly, for his wife, the plaintiff, for life; thirdly, after the death of the survivor, for their issue; fourthly, in default of such issue, for such persons as he, William, should by deed or will appoint; and, fifthly, in default of appointment, for Earl Cadogan, the father of William. The indenture also gave to William and his wife a joint power of revoking the trusts thus created.

There was no child of the marriage between the testator and his wife. The testator did not, in his lifetime, in any manner execute his general power of appointment in the indenture of 26th May, 1783 [1798?], ~~or his power of appointment of the said sum of £1,000,~~ unless by his will; nor did he, together with the plaintiff, execute their joint power of revocation therein contained.

The plaintiff claimed, under a provision in her husband's will, to be entitled to one fourth part of the £20,000, and the bill was filed against the executors of the Earl of Cadogan to establish her right.

The defendants, in their answer, claimed to be entitled to the whole of the fourth share of the said William Bromley Cadogan, subject to

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[1] Ellison *v.* Ellison, 6 Ves. 656 (*semble*); Pulvertoft *v.* Pulvertoft, 18 Ves. 89 *Accord.* — ED.

the plaintiff's right to the interest for her life under the indenture of 26th of May, 1783.[1]

Mr. Richards, *Mr. Stephen*, *Mr. Bowdler*, and *Mr. Sugden*, for the plaintiff.

Sir Samuel Romilly and *Mr. Raithby*, for the defendants.

Mr. Richards, in reply.

Master of the Rolls, having taken time to consider. Two points were made on the part of the plaintiff: 1st, that it was not necessary that the husband should execute the power; but, 2dly, if it was, that his will did amount to an execution of it.[2] As to the first, it was said that the gift to Lord Cadogan was merely voluntary, and Lord C. could not have had any assistance from this Court: that the question is the same as if the representatives were parties seeking relief, as the circumstance of his executors having the money makes no difference, and I think that that circumstance is immaterial. But, as against the party himself and his representatives, a voluntary settlement is binding. The Court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees. Mr. W. Cadogan had an equitable reversionary interest in that fund, and he has assigned it to certain trustees; and then the first trustees are trustees for his assigns, and they may come here, for when the trust is created no consideration is essential, and the Court will execute it, though voluntary.

The bill must be dismissed as to this fund.

FORTESCUE *v.* BARNETT.

In Chancery, before Sir John Leach, M. R., January 20, 1834.

[*Reported in* 3 *Mylne & Keen*, 36.]

The defendant, John Barnett, shortly after the intermarriage of his sister, Mary Barnett, with Henry White, executed an indenture dated the 17th of December, 1813, and made between himself of the first part, the said Henry White, since deceased, of the second part, Mary White, the wife of Henry White, of the third part, and the plaintiff, William Fortescue, and Thomas White, deceased, of the fourth part, whereby, after reciting that the Equitable Assurance Society had, by a policy of assurance dated the 27th of September, 1811, assured to be paid to the executors, administrators, and assigns of John Barnett, after his decease, £1,000, on payment of the annual premium of £25 11*s.*, it was witnessed that, in consideration of the marriage then lately solemnized between Henry White and Mary White, and for making some provision for the said Mary White and her child and children, if she, or any such child or children, should survive John Barnett, he, the said John Barnett, assigned and transferred to William Fortescue and Thomas White the said policy of assurance, and the sum of £1,000 thereby assured, and all interest and produce to become due or payable by virtue thereof, and all his right and interest therein, to hold to William Fortescue and Thomas White, their executors, administrators, or assigns, upon trust, in case Mary White and all and every her child and children should happen to die in the lifetime of John Barnett, for John Barnett, his executors, administrators, and assigns, and to reassign the same to him and them accordingly; but if Mary White, or any child or children of Mary White, should happen to outlive John Barnett, then in trust that William Fortescue and Thomas White, their executors, administrators, or assigns, should invest the said sum of £1,000, and all other money which should become due on the said policy, in the public stocks or funds, upon the trusts therein declared, for the benefit of Mary White and her child or children. The deed contained a covenant on the part of John Barnett, for himself, his executors and administrators, to pay and keep up the annual premiums payable upon the policy.

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[1] This summary of the facts is substituted for the much fuller statement in Sugden. The arguments of counsel are also omitted. — Ed.

[2] The Master of the Rolls held that the will did not amount to an execution of the power. So much of the case as relates to this point is omitted. — Ed.

This deed was delivered to Thomas White, one of the trustees named therein, and remained in his possession till his death, which happened in October, 1832; but the defendant, Barnett, retained possession of the policy of assurance.

Shortly after the death of Thomas White, the deed was sent by one of his executors to William Fortescue, the surviving trustee, who, upon application at the office of the Equitable Assurance Society, was informed that no notice had ever been given to the society of the assignment of the policy; that in July, 1830, a bonus of £795, payable upon the death of John Barnett, had been declared on the policy, which bonus was surrendered by Barnett to the society in the same month of July, in consideration of the sum of £394 15*s.*; and that in November, 1832, Barnett surrendered the policy itself to the society, in consideration of the further sum of £326 13*s.*

The bill was originally filed by Fortescue against Barnett alone, for the purpose of compelling him to replace or give security for the value of the policy and bonus so surrendered, and of all bonuses which might have accrued or have been capable of being declared thereafter, if the policy had not been surrendered; but the defendant demurred to the bill for want of parties, and, the demurrer being allowed, Mrs. White and her children were made parties by amendment, leave having been given for that purpose.

The bill prayed that the defendant, Barnett, might be decreed to pay to the plaintiff, or otherwise secure upon the trusts of the indenture of the 17th of December, 1813, the sum of £1,795, being the amount of the sum secured by the policy, together with the bonus declared thereon, and such further sum as should be sufficient to answer all future bonuses which, according to the regulations of the Equitable Assurance Company, would have accrued due in respect of the policy if it had not been surrendered.

The defendant, Barnett, by his answer, stated that the settlement of the policy was a mere voluntary act on his part, and made out of his personal regard for his sister; and that he executed the settlement under the impression that he should have the control of the policy during his life, and power, if he thought fit, to revoke or alter the disposition of the same. He further stated that the policy had been surrendered after the death of Mrs. White's husband, and with her consent, in order to save the expense of the annual premium, and with the understanding that the amount of the premium should be annually paid to Mrs. White, which had, in fact, been done. The defendant further stated that, at the time of surrendering the policy, he executed a codicil to his will, whereby he made a provision for Mrs. White and her children to the extent of £1,000, and that he put Mrs. White, at the same time, into possession of a freehold estate of the value of £400, of which she had ever since received the rents and profits, and that he had devised such freehold estate to her eldest son by his will.

The question in the cause was, whether the defendant was or was not bound to replace or give security for the value of the policy.

Mr. Bickersteth and *Mr. Willcock*, for the plaintiff.[1]

Mr. Rolfe, for the widow, disclaimed any desire on her part to obtain relief in this suit, to which she was an unwilling party. The defendant had been her greatest benefactor, and she was satisfied that whatever steps he had taken in this transaction had been taken with a view to her benefit and the interests of her children.

Mr. Pemberton and *Mr. W. C. L. Keene*, for the defendant, Barnett.

THE MASTER OF THE ROLLS. In the case of a voluntary assignment of a bond, where the bond is not delivered, but kept in the possession of the assignor, this court would undoubtedly, in the administration of the assets of the assignor, consider the bond as a debt to the assignee. (There is a plain distinction between an assignment of stock where the stock has not been transferred, and an assignment of a bond.) In the former case, the material act remains to be done by the grantor, and nothing is, in fact, done which will entitle the assignee to the aid of this Court until the stock is transferred; whereas the Court will admit the assignee of the bond as a creditor.

In the present case, the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant if the trustees had given notice of the assignment to the assurance office. The question does not here turn upon any distinction between a legal and an equitable title, but simply upon whether any act remained to be done by the grantor which, to assist a volunteer, this Court would not compel him to do. I am of opinion that no act remained to be done to complete the title of the trustees. The trustees ought to have given notice of the assignment; but their omission to give notice cannot affect the *cestuis que trust*. The defendant appears to have acted in this transaction with the purest intentions, but he has rendered himself amenable to the jurisdiction of this Court, and he must give security to the amount of the value of the policy assigned by the deed of settlement. The plaintiff is entitled to costs.[1]

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[1] The arguments of counsel are omitted. — ED.

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[1] The donee of a policy of insurance acquires the legal title to the document and an irrevocable power to sue upon it in the name of the donor, but for his own benefit (or for his *cestui que trust* if the gift is upon trust) whenever (1) the policy is delivered to the donee: Harrison *v.* McConkey, 1 Md. Ch. 34; Crittenden *v.* Phœnix Co., 41 Mich. 442; McCord *v.* Noyes, 3 Bradf. 139; Licey *v.* Licey, 7 Barr, 251, 253 (*semble*); Bond *v.* Bunting, 78 Pa. 210, 218 (*semble*); Madeira's App., 17 W. N. C. (Pa.) 202; Malone's Est., 13 Phila. 313; or (2) the gift, as in the principal case, is by deed: Pearson *v.* Amicable Co., 27 Beav. 229; Sewall *v.* King, 14 Ch. D. 179; Justice *v.* Wynne, 12 Ir. Ch. R. 289; Otis *v.* Beckwith, 49 Ill. 121; Badgley *v.* Votrain, 68 Ill. 25, 28 (*semble*); Massey *v.* Huntington, 118 Ill. 80 (*semble*); Trough's Est., 75 Pa. 115; Bond *v.* Bunting, 78 Pa. 210; Scott *v.* Dixon, 108 Pa. 6 (*semble*). But see, *contra*, Ward *v.* Audland, 8 Beav. 201. In Pearson *v.* Amicable Co., *supra*, Lord Romilly said (pp 232–234): —

Wis. 527

"I also fully admit, that in these cases there is a distinction between that species of instrument which, by assignment, passes the property, and that which simply operates as a declaration of trust, and I agree that this is not a declaration of trust. The question is, whether this is a complete instrument, or whether it requires the assistance of a court of equity for its enforcement? I am of opinion that it is a complete and perfect instrument, and I will state why I think so.

"If this were an assignment of the policy for value, and the purchaser had come to this Court for its assistance to render the assignment more complete, what would remain to be done? The assignor would say, 'What can I do more than I have already done? If you had told me, out of court, what further assurance or what further deed or assignment to make this instrument more complete, I would have executed it.' The question, whether anything remains to be done to complete the assignment of a policy is exactly the same, whether it arises upon a voluntary instrument or upon one for valuable consideration: whether it be one or the other, the question must be, what is there that the assignee can require the assignor to do to make the instrument more complete. The error in the argument of the defendants is this: it is assumed that this is a suit in which an assignee has come here to ask the aid of the Court in making this instrument more complete; but he does nothing of the sort. It is said by the defendants, 'If the plaintiffs do not require the assistance of this Court, why do they not proceed at law?' but the proceeding suggested in this case would be against the executors; this is not a suit against the executors, it is a suit against the insurance company. The insurance company say, 'We are perfectly ready to pay; we do not contest your claim; you want nothing to make the instrument more complete, and we are ready to pay the amount, but we must not remain open to two suits; and therefore, as the executors raise an adverse claim to the policy, it is not for us to decide whether it is a valid claim or not, and we require the assistance of this Court to prevent our being doubly vexed by two suits, and to determine which of the two claimants is entitled to the money due on the policy. We admit the claim respecting it, there is the money, which we are ready to pay into court.'

"The plaintiffs say our instrument is perfect and complete, we do not ask for any relief against the executors, why should we not have the money? The insurance office is right in paying it to us; it is for the executors to make out their claim. The

EDWARDS *v.* JONES.

IN CHANCERY, BEFORE LORD COTTENHAM, C., JANUARY 6, 19, 23, 1836.

[*Reported in* 1 *Mylne & Craig*, 226.]

IN the year 1819, John Nathaniel Williams, being indebted to Mary Custance in the sum of £300, gave her a bond for securing that sum with interest. In the year 1828 the said sum of £300 being still due, together with an arrear of interest, amounting to the sum of £123 15*s.*, a second bond was given by J. N. Williams to Mary Custance, for securing the latter sum with interest thereon.

The whole of the two sums of £300 and £123 15*s.* remained due upon the security of the two bonds, at the time of the death of Mary Custance.

On the 25th of May, 1830, only five days before her death, Mary Custance signed the following indorsement upon the bond of 1819: "I, Mary Custance, of the town of Aberystwith, in the county of Cardigan, widow, do hereby assign and transfer the within bond or obliga-

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question is, whether the executors can make out any claim. If the assignment had been made for value, it is clear that the assignor could not have prevented the assignee from using his name in suing the insurance company, if they had resisted the demand, and this Court could not, and would not, have allowed the assignor to say his name should not be made use of. The executors can stand in no better situation than the assignor: this Court would not have prevented the assignee from making use of the name of the assignor, if the insurance company had resisted payment. But here the power of attorney is voluntary; it is irrevocable, and in the form usual in all these instruments, and this Court will not allow the grantor to contradict his deed. The Court will not assist a volunteer, but it does not say, on the other hand, that it will assist an assignor in defeating his voluntary deed. The argument has been founded on the supposition that by this suit the trustees are asking the assistance of a court of equity; but in truth they come here only to resist the executors of the assignor, who have raised a claim which the assignor was not himself entitled to raise, and which they, standing in his shoes, are not entitled to raise, but which nevertheless makes it impossible for the plaintiff to receive the money until the claim of the executors is disposed of."

In Rummens *v.* Hare, 1 Ex. Div. 169, where the donor of a policy attempted, unsuccessfully, to recover it in Detinue, Lord Cairns, C., remarked: "The intestate could not have claimed to have the document returned to him, nor can his administratrix now claim it. We have nothing to say as to the money which is secured by it. This is one of those cases in which the plaintiff may not be able to recover the document, which is the evidence of the debt, while the person who holds that evidence may not be able to recover the debt itself; but with that we have nothing to do." Witt *v.* Amis, 1 B. & S. 109, is a similar case, except that the gift was *mortis causa.* See *infra*, p. 145, n. 1; p. 156, n. 1; p 162, n. 4.

A gift of a policy of insurance by a husband to his wife, whether by deed or by delivery of the document, has, of course, no effect at common law; nor does it give the wife any interest in equity; Howes *v.* Prudential Co., 49 L. T. Rep. 133; Hayes *v.* Alliance Co., L. R. 8 Ir. 149; except in jurisdictions where, as in this country, such a transaction is treated not as a gift, but as an agreement founded upon a meritorious, and therefore valid consideration. See *infra*, p. 175, note. — ED.

tion, and all my right, title, and interest thereto, unto and to the use of my niece, Esther Edwards, of Llanilar, in the said county of Cardigan, widow, with full power and authority for the said Esther Edwards to sue for and recover the amount thereof, and all interest now due or hereafter to become due thereon: as witness my hand, this 25th of May, 1830."

The bond of 1828 was usually kept with the bond of 1819. At the time at which the indorsement was signed, the two bonds were fastened together by a pin. Immediately after the indorsement had been signed, Mary Custance delivered or caused to be delivered both the bonds to Esther Edwards, the plaintiff in this suit. The bonds remained in the hands of the plaintiff until the filing of the bill. Mary Custance died on the 30th of May, 1830, having in the year 1829 made her will, in which she did not mention the bonds, or dispose of the residue of her property, but by which she appointed the defendant, Rice Jones, her executor, who duly proved the will. After Mary Custance's death, the defendant, who had been aware in her lifetime of the existence of the bonds, supposing that they had been lost, prevailed upon J. N. Williams, the obligor, to execute a new bond for the amount due upon the two old bonds, and at the same time gave to the obligor a bond of indemnity against any claim which might be made under the old bonds.

In the month of January, 1832, J. N. Williams, the obligor, died, and afterwards his widow and executrix paid to the defendant the amount for which the new bond had been given.

The bill stated that the plaintiff was a niece of Mary Custance, and that Mary Custance had a great affection for the plaintiff, and entertained, and at different times expressed, an intention to give or leave to the plaintiff the bonds, and the money due upon them. It alleged that Mary Custance delivered, or caused to be delivered, to the plaintiff both the bonds, intending that the plaintiff should be entitled thereto, and to the moneys respectively secured thereby, in case of and after the decease of her the said Mary Custance, and expressing herself to that or the like effect; and the bill also alleged that the bonds, and the money due upon the same, were well given to the plaintiff, by Mary Custance, as a gift, or as a *donatio mortis causa*, and that the plaintiff became entitled thereto. The bill then went on to allege that, under the circumstances, the plaintiff was entitled to the sum due on the bonds, and that the defendant, so far as he had a legal right of action upon them, was a trustee for the plaintiff, and that he was a trustee for the plaintiff for the money received by him from the executrix of the obligor.

The prayer of the bill was, that it might be declared that the plaintiff was and is entitled to the principal and interest which was due upon the two bonds, and that the defendant might be declared to be a trustee thereof for the plaintiff, and that an account might be taken of what had been received by the defendant in respect of the several sums secured by the bonds, and the interest thereof respectively; and that the defendant might be decreed to pay to the plaintiff what should appear to have been so received by him, with interest thereon from the time when the same was received; and in case it should appear that the defendant had not received from the estate of John N. Williams, the obligor, the whole of the principal and interest, then that the plaintiff might be at liberty to take such proceedings as she might be advised for the recovery thereof, in the name of the defendant; and in case it should appear that the defendant had released or discharged the estate of J. N. Williams, the obligor, from the debt, without receiving the whole thereof, then that the defendant might be decreed to make good the same.

It appeared, by the evidence, that the indorsement was written upon the bond before the day on which it was signed by Mary Custance; and that at the time at which she signed it, although upwards of eighty years of age, and laboring under a very painful disease, — cancer in the breast, — she was not worse in health than she had been for some time previously, and that she was not in bed, and that it was not then expected by those about her that her death would occur so soon afterwards as it did. It appeared also that the transaction took place about seven o'clock in the morning, all parties desiring that it should be concealed from a sister of Mary Custance; and it was proved that Mary Custance accompanied the act of signing the indorsement by saying that she was thereby giving the Castle Hill money (by which term she was accustomed to designate the money due upon the bonds) to the plaintiff.

The cause was heard before the Vice Chancellor, who dismissed the bill with costs. The plaintiff now appealed from his Honor's decision.

Mr. Jacob and *Mr. Blake*, for the plaintiff.[1]

Mr. Kindersley and *Mr. Richards*, for the defendant.

The Lord Chancellor (after stating the substance of the bill). The case being thus stated in the bill, it was argued at the bar that the bonds were delivered either by way of *donatio mortis causa*, or as a gift *inter vivos*. Now, in order to be good as a *donatio mortis causa*, the gift must have been made in contemplation of death, and intended to take effect only after the donor's decease.

I consider the language of the assignment itself to exclude the possibility of treating this as a *donatio mortis causa*.[2]

The first question upon the other point is, whether the plaintiff has in this suit claimed the property as an absolute gift. The bill has, in fact, negatived the case of gift; for it states that the donor intended that the delivery should operate as a *donatio mortis causa*. Having made that allegation of fact, it is immaterial that there should be, in another part of the bill, an allegation stating a conclusion of law. If the question turned upon that point, if there were a case which would appear to constitute a gift, the Court would give effect to it. Such, however, is not the case, because, whatever might have been alleged on the record, there was no ground for supposing that a case could be established which would support the transaction as a gift.

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[1] The arguments of counsel are omitted. — Ed.

[2] The opinion of Lord Cottenham upon this point has been greatly abbreviated. — Ed.

The transaction being inoperative for the purpose of transferring the bond, which was a mere chose in action, the question comes to be, whether the mere handing over of the bond, — supposing the record so to have stated the facts as to have entitled the plaintiff to make such a claim, — whether such a transaction would constitute a good gift *inter vivos;* that is to say, whether the plaintiff would be entitled to the assistance of a court of equity for the purpose of carrying into effect the intention of the parties. Now it is clear that this is a purely voluntary gift, and a gift which cannot be made effectual without the interposition of this Court. The circumstance of the bond having been afterwards paid, and the money having got into the hands of the defendant, cannot make any difference in the determination of the question, which must depend upon the same principles as if it had arisen before.

The rule that this court will not aid a volunteer to carry into effect an imperfect gift has been established by many decisions, and in particular by Colman *v.* Sarrel, Ellison *v.* Ellison,[1] and *Ex parte* Pye. The case of Antrobus *v.* Smith[2] comes nearer to the circumstances of this case than any of those which have been referred to. There was in that case an indorsement pretty much in the same language with the present assignment; and the general doctrine there laid down by Sir William Grant is extremely applicable here. In order to bring this transaction within the rule, that, if there be a trust created, and the relation of trustee and *cestui que trust* once constituted, the court will execute the intention, it was argued here that the defendant became a trustee for the donee. The same argument was used in the case of Antrobus *v.* Smith, and it was met by Sir W. Grant with this observation: "Mr. Crawfurd was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which in the mode of making it he has left imperfect. There is *locus penitentiæ* as long as it is incomplete." Every word of that judgment applies directly to the circumstances of the present case. It is impossible, indeed, to distinguish the two cases; and it is equally impossible to question the doctrine there laid down.

It was said, however, that there were two later decisions interfering with this doctrine Sloane *v.* Cadogan and Fortescue *v.* Barnett. Now, it is sufficient to prevent those cases from applying, that in neither of them was any intention expressed by the learned judge to depart from the established rule, but that in both the decisions turned upon the question of fact, whether or not the relation of trustee and *cestui que trust* was actually constituted. In neither was it attempted to make perfect an imperfect gift. In Sloane *v.* Cadogan, the claim was not against the donor or his representatives, for the purpose of making that complete which had been left imperfect, but against the persons who had the legal custody of the fund; and the question was, whether the transaction constituted them trustees of the fund for the *cestui que trusts*. Sir W. Grant came to the conclusion that it did; and the consequence was that they were bound to account. That case has been considered by Sir Edward Sugden as going a great way; but, upon the principle stated by Sir W. Grant, it is free from all possible question, for there was no attempt in that case to call in aid the jurisdiction of this court.

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[1] 6 Ves. 656.

[2] 12 Ves. 39.

Fortescue *v.* Barnett falls precisely within the same observation, although there are some expressions in it, especially where the learned judge speaks of a bond which has been voluntarily assigned being considered a debt to the assignee, which probably were not intended to convey the meaning they do. The case itself, and the judgment pronounced upon the facts, do not in any way touch the present question. There, a party had insured a life, and the contract of the office was, to pay to the party insuring, his executors, administrators, and assigns; but the practice of the office was stated to be, that upon an assignment the office recognized the assignee, and the policy was, therefore, an assignable instrument. The policy was not assignable at law, but it was a title which, by contract, was assignable as between the parties; and the party in that case assigned, but the assignee did not give notice to the office, and consequently the original insurer dealt with the office, received a bonus, and then surrendered the policy. The Master of the Rolls in that case considered, as he naturally would, whether this transaction was not a gift, — whether it did not, in fact, confer a title on the assignee; and if it did, then, consistently with all the authorities, he considered that he was bound to give the assignment its full effect; and he put his decision expressly upon the fact that the transaction was complete, — that there was nothing further for the donor or the donee to do, — that the latter had nothing to ask further from the donor. Whether, upon the circumstances of that case, it was right or wrong to come to that conclusion, is a question with which I have nothing to do. The principle of the decision is quite consistent with the other cases; for it proceeds upon the same ground; namely, that, if the transaction is complete, the court will give it effect. So far, therefore, are these two cases from being authorities in favor of the gift in the present case, the principle acted upon in them by the learned judges is quite consistent with my refusing to aid the plaintiff in the present bill.

On the whole, I see no reasonable ground for impeaching the decision of the Vice Chancellor, and his decree must, therefore, be affirmed.[1]

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[1] "A man may give or grant his deed to another, and such grant by parol is good. And it is also implied, that if a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, viz. the parchment and wax, to another, who may cancel and use the same at his pleasure." Co. Lit. 232 a, b. See to the same effect Kelsack *v.* Nicholson, Cro. El. 496; Chadwick *v.* Sprite, Cro. El. 826; Mallory *v.* Lane, Cro. Jac. 342.

In the time of Coke, a purchaser or donee of a chose in action acquired no right against the obligor. The so called assignee (more properly the grantee of a power of attorney for his own use) was not permitted to sue, even in the assignor's name, unless the chose in action was transferred to him on account of a pre-existing debt. 1 Harv. L. Rev. 6; 3 Harv. L. Rev. 340. Furthermore, even a creditor of the assignor could not sue in the latter's name unless he had an *express* power of attorney to that effect (Mallory *v.* Lane, Cro. Jac. 342), the notion of an implied power of attorney being as much beyond the conception of lawyers three centuries ago as the analogous idea of an implied promise. 2 Harv. L. Rev. 53, 58.

These difficulties in the path of the assignee have, however, disappeared. To-day a transfer to a purchaser or donee is as free from maintenance as an assignment to a creditor; and a power to sue is as easily implied as a promise to pay from circumstantial evidence. It is, accordingly, everywhere agreed that if a bond is assigned either on account of a pre-existing debt, or by way of sale, whether with or without an express power of attorney, the creditor or the purchaser may sue the obligor in the name of the assignor or his representative. The implication of a power to sue in the assignor's name would seem equally obvious in favor of a donee when the bond is delivered, delivery being as effectual as a consideration to vest the title to the document in the transferee

The decisions, however, are not altogether satisfactory.

In GIFTS CAUSA MORTIS the irrevocable right of the donee is admitted both in England and the United States. Snellgrove *v.* Bailey, 3 Atk. 214; Duffield *v.* Elwes, 1 Bligh, N. S. 542; Gardner *v.* Parker, 3 Mad. 184; Staniland *v.* Willott, 3 MacN. & G. 676; Waring *v.* Edmonds, 11 Md. 424; Kiff *v.* Weaver, 94 N. Ca. 274; Wells *v.* Tucker, 3 Binn. 366; Lea *v.* Boak, 11 Grat. 182.

85 Me. 2
59 Va. 1

In GIFTS INTER VIVOS, on the other hand, if the principal case is still law, the donee has no claim against the obligor. This case was followed in Searle *v.* Law, 15 Sim. 95, and approved in *Re* Richardson, 30 Ch. Div. 396, 401, 404. But see, *contra*, Roberts *v.* Lloyd, 2 Beav. 376; Patterson *v.* Williams, Ll. & G. t. Plunket, 95, 99 (*semble*); and especially *Re* Patrick, '91, 1 Ch. 82.

This distinction between a gift *inter vivos* and a *donatio mortis causa*, it is safe to say, was not contemplated by Lord Hardwicke in Snellgrove *v.* Bailey, *supra*. See also 1 Bligh. N. S. 500, per Sugden *arguendo*. And since the donor cannot recover the bond from the donee, having voluntarily parted with it (Barton *v.* Gainer, 3 H. & N. 387, see also *supra*, 140, n. 1; *infra*, 156, n. 1; 162, n. 4), and for want of it is also without remedy against the obligor, we have this anomalous condition of things, namely, two adverse claimants of a debt confessedly due, and the courts powerless to give judgment for either.

This unfortunate conclusion is avoided, and consistency maintained, in this country, where the gift of a bond *inter vivos* is put on the same footing with a gift in view of death. Ensign *v.* Kellogg, 4 Pick. 1; Hunt *v.* Hunt, 119 Mass. 474; Cox *v.* Hill, 6 Md. 274 (*semble*); Ruckman *v.* Ruckman, 33 N. J. 354; Gilchrist *v.* Stevenson, 9 Barb. 9; Hunter *v.* Hunter, 19 Barb. 631; Hackney *v.* Vrooman, 62 Barb. 650; Johnson *v.* Spies, 5 Hun, 468 (*semble*); Taber *v.* Willetts, 44 Hun, 346; *Re* Wirt, 5 Dem. 179; Pringle *v.* Pringle, 59 Pa. 281; Zimmermann *v.* Streeper, 75 Pa. 147: Elam *v.* Keen, 4 Leigh, 333; Sterling *v.* Wilkinson, 83 Va. 791 (*semble*); Lewis *v.* Mason, 84 Va. 180 (*semble*); Fleshman *v.* Hoylman, 27 W. Va. 728; Wilson *v.* Carpenter, 17 Wis. 512 (*semble*). See also Rupert *v.* Johnston, 40 U. C. Q. B. 11, 16, 17.

A deed of gift without delivery is as effectual as a parol gift with delivery. See

[illegible] orgl trstees. Hld: E dnce my go [illegible]
trstees r fre [illegible] e assgnmt wt [illegible]
at all.

DONALDSON *v.* DONALDSON.

In Chancery, before Sir W. P. Wood, V. C., August 11, 1854.

[*Reported in Kay*, 711.]

Vice Chancellor Sir W. Page Wood.[1] In this case a question has been raised how far a deed of assignment, executed by Thomas Hudson, and dated the 29th day of June, 1850, by which he voluntarily assigned a large amount of property, consisting of various securities, to trustees upon certain trusts for the benefit of his donees, has been available to pass certain portions of the property included in the deed. The question has arisen between some of the parties claiming under the deed and the Crown, because the property which did not pass by the deed would be liable to probate and legacy duty, as passing by the settlor's will.

With respect to the great bulk of the property comprised in the deed, the counsel for the Crown has conceded, that, as it stood in the funds and other securities in the name of the settlor, and as he has executed a declaration of trust contained in this deed, the relation of trustee and *cestui que trust* has been created, so that this Court will give effect to it. The real question arises with respect to the sum of £29,400 stock, which was standing in the names of the trustees of the settlor's marriage settlement in trust for himself. I do not think that the declaration of trust annexed to the description of this stock in the schedule is material. What I have to consider is, how far an assignment of this kind, of which no notice was given to the trustees in whose names this stock was standing, was effectual to pass the property therein to the trustees of the voluntary deed, so that this Court would hold, as between the donees under that deed and the representatives of the assignor, that the title was complete. For the purposes of this question, it was necessary to consider the case of Kekewich *v.* Manning,[2] in which the other decisions are reviewed and commented on by Lord Justice Knight Bruce, and which seemed to me, if I may use the expression, to stem the current of authority which had begun to set in adversely to these trusts, more especially since the decision in Edwards *v.* Jones. Ever since that case there has been considerably more difficulty as to how far a voluntary assignment of a chose in action does or does not confer a title on the donee. Looking through the

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Brownl. 40; Drakeford *v.* Wilks, 3 Atk. 539 (*semble*); Patterson *v.* Williams, Ll. & G. t. Plunket, 95, 99 (*semble*); Smith *v.* Bissell, 19 N. Y. W. D. 264. The case of Bizzey *v.* Flight, 24 W. R. 957, *contra*, seems to be overruled by *Re* Patrick [1891], 1 Ch. 82.

Judgments. — A specialty in the form of a judgment may be gratuitously transferred as freely as a specialty by deed. Delivery of the judgment is enough in this country. Mack *v.* Mack, 3 Hun, 323, Brunson *v* Brunson, Meigs, 630. Whether the rule is now the same in England must depend upon whether the principal case (Edwards *v* Jones) is still law. See Patterson *v.* Williams, Ll. & G. t. Pl. 95. — Ed.

[1] See *supra*, p. 70, n. 1. — Ed.

[2] 1 DeG., M. & G. 176.

cases, the principle which I gather from them is the same as that on which the Lords Justices seem to have proceeded in Kekewich *v.* Manning,[1] and though that case does not go so far as the present, I still think that this is concluded by it. In all the cases, except Beatson *v.* Beatson[2] and particularly in *Ex parte* Pye, it is laid down that, when there is a complete declaration of trust by a party concerning stock or choses in action vested in himself, this Court will enforce it. On the other hand, where there is a contract only, or an imperfect gift, which requires some other act to complete it on the part of the assignor or donor, the Court will not interfere to require anything else to be done by him. The intermediate cases alone are difficult of solution. The question is, in every case, has there been a declaration of trust, or has the assignor performed such acts that the donee can take advantage of them without requiring any further act to be done by the assignor; and, if the title is so far complete that this Court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him. In Beatson *v.* Beatson[2] alone there was an assignment of an equitable interest in stock, which was vested not in the donor but in a third party, and it was held that the Court would not assist the volunteer. In Dillon *v.* Coppin[3] stock standing in the donor's own name was assigned, and there this distinction was taken, which was somewhat nice, but still consistent with Ellison *v.* Ellison[4] and the other cases; namely, that, the stock being in the name of the donor himself, and there being no declaration of trust but a mere assignment, which would not pass the stock at all, and the deed showing an evident intention on the part of the assignor to do some further act, and containing a covenant to perfect the gift, the Court said, we cannot call upon the donor to transfer the stock or complete the gift. But in the case of an assignment of the equitable interest in stock standing in the names of trustees, the deed of assignment passes the whole equitable interest of the donor, and the donee may go with that deed to the trustees, and say, transfer to me the interest in this sum of stock; and I think that in such a case it would not even be necessary to make the donor a party to a suit to enforce the gift. Pl.

Then the question is, whether, notice not having been given to the trustees, the gift could be enforced. As to that, it has been said in some cases, that the gift is complete when no further act is required to be done by the donor or the donee; and that seems to imply a doubt whether, if there were any act to be done by the donee, the gift could be treated as complete. But the assignment has completely passed the interest of the donor. It is true, that, if no notice of it were given to the trustees, they would be justified in transferring the stock to the original *cestui que trust* for whom they held it; and, if they did so, there would be no remedy against them; and it is possible that the donee might not be able to recover the stock; but all that the donee has to do is, at any time he thinks fit, to give notice to the trustees before the stock is transferred; and when he has given such notice, his title is complete: and, unless the donor or his executors actually obtain possession of the fund, the donee does not require the aid of this Court against them. The fact that the trustees are themselves the executors of the donor in this case, I think, does not make any difference. As the donor has not obtained possession of the fund, the donees have a right to go to the trustees and require them to transfer the stock, or come to the Court to have that done. The donees require no assistance from the Court against the original assignor, and therefore the assignment is such as the Court will support. That is the principle upon which cases like Sloane *v.* Cadogan proceed, and which Lord Cottenham seems to recognize in Edwards *v.* Jones, where he says, "In Sloane *v.* Cadogan the claim was not against the donor or his representatives for the purpose of making that complete which had been left imperfect, but against the persons who had the legal custody of the fund; and the question was, whether the transaction constituted them trustees for the fund for the *cestui que trusts*." Sir W. Grant came to the conclusion that it did; and the consequence was, that they were bound to account. That case has been considered by Sir Edward Sugden as going a great way; but, upon the principle stated by Sir W. Grant, it is free from all possible question, for there was no attempt in that case to call in aid the jurisdiction of the Court." In this case, there is no need whatever for the donees to call in aid the jurisdiction of this Court against the original assignor or his representatives. All that they have to do is, to require the trustees who hold the fund to transfer it to them.

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[1] 1 DeG., M. & G. 176.
[2] 12 Sim. 291.
[3] 4 My. & Cr. 647.
[4] 6 Ves. 656.

This decision goes somewhat beyond all the authorities except Cadogan *v.* Sloane; but I cannot hold that the owner of an equitable interest in a chose in action is not entitled to assign it; and I think that, upon the principle recognized in Ellison *v.* Ellison,[1] and like cases, I must decide that the equitable interest in this stock was effectually assigned by this deed.[2]

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[1] 6 Ves. 656.

[2] Villers *v.* Beaumont, 1 Vern. 100; Ellison *v.* Ellison, 6 Ves. 656; Bentley *v.* Mackay, 15 Beav. 12; Voyle *v.* Hughes, 2 Sm. & G. 18; Lambe *v.* Orton, 1 Dr. & Sm. 125; Gilbert *v.* Overton, 2 Hem. & M. 110; *Re* Way's Trusts, 2 D. J. & S. 365; Nanney *v.* Morgan, 37 Ch. Div. 346; *Re* Lucan, 45 Ch. D. 470 (*semble*); Gannon *v.* White, 2 Ir. Eq. 207; Ensign *v.* Kellogg, 4 Pick. 1; Stone *v.* Hackett, 12 Gray, 227; Henderson *v.* Sherman, 47 Mich. 267; Johnson *v.* Williams, 63 How. Pr. 233; Ham *v.* Van Orden, 84 N. Y. 257; Patton *v.* Clendennin, 3 Murph. (N. Ca.) 68 (*semble*); Chasteen *v.* Martin, 84 N. Ca. 391 *Accord.*

Bridge *v.* Bridge, 16 Beav. 315 (said in *Re* King, 14 Ch. D. 184, to have been decided on a wrong ground); Meek *v.* Kettlewell, 1 Hare, 464 (said in Penfold *v.* Mould, 4 Eq. 562, and Sullivan *v.* Sullivan, Brunner, 645, to be in effect overruled) *Contra.*

(Although, as the principal case shows, a *cestui que trust* may make a valid gratuitous assignment of his trust, he cannot without consideration create a valid equitable charge upon his interest.) *Re* Lucan, 45 Ch. D. 470. On the same principle, a so called partial assignment of a chose in action, being in effect an equitable charge, is inoperative, if not supported by a consideration. Alger *v.* Scott, 54 N. Y. 14. — Ed.

[illegible]. One can only contract that [illegible] shall happen [illegible]; you can't make a [illegible] assignment of [illegible] future interest. See 1903. 1 Ch. 697

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MILROY v. LORD.

In Chancery, before Sir J. L. Knight Bruce and Sir G. J. Turner, L. JJ., June 2, 3, 4, July 26, 1862.

[*Reported in* 4 *De Gex, Fisher, & Jones*, 264.]

This was an appeal by the defendant Otto, the personal representative of Medley, from a decree of Vice Chancellor Stuart.

The bill was filed by Andrew Row M'Taggart Milroy and Eleanor Rainey, his wife, formerly E. R. Dudgeon, for the purpose of having new trustees appointed of a voluntary settlement made by the late Thomas Medley, and for recovering fifty shares of the Bank of Louisiana, which formed the subject of the settlement, and thirteen North American fire insurance shares, which were purchased with the income of the bank shares, together with the dividends upon all the above mentioned shares, so far as they had not been paid over to the plaintiffs or one of them; and the bill also prayed that the defendant Samuel Lord, the trustee named in the settlement, might be decreed to make compensation to the plaintiffs and other the parties entitled under the settlement in respect of his having given up the certificates for the shares to the defendant Otto, the executor of Thomas Medley.

The settlement in question was made by a deed poll, dated the 2d April, 1852, which was as follows: —

"Know all men by these presents, that I, Thomas Medley, of the city of New Orleans, on account of the love and affection I have for my niece, Eleanor Rainey Dudgeon, daughter of Daniel Dudgeon, of England, and in consideration of one dollar to me in hand paid, have conveyed, transferred, set over, and delivered, and by these presents do convey, transfer, set over, and deliver, unto Samuel Lord, of the city and county of New York, fifty shares of the capital stock of the Bank of Louisiana, now standing in my name in the books of the said bank, together with the certificate or scrip thereof, numbered 3,457, and dated the 6th March, 1852, under the corporate seal of the said bank, signed by W. W. Montgomery, president, and attested by R. M. Davis, cashier, and the dividends and profits thereof, to have and to hold to the said Samuel Lord and his legal representatives upon the trusts and conditions following, to wit, in trust to collect and receive the dividends and profits of the said stock, and apply them to the use and benefit of the said Eleanor Rainey Dudgeon, if I be living until the time of the marriage of the said Eleanor, and upon the further trust, in case I die before the marriage of the said Eleanor, leaving her surviving me, then to transfer the said shares of stock, or the proceeds thereof, to the said Eleanor, for her own use and benefit; and upon the further trust, in case the said Eleanor should during my lifetime marry, with my previous consent and approbation, then to apply the said dividends and profits to the use of the said Eleanor for life, and after her death to convey and transfer the said stocks or the proceeds thereof to her issue, if she leave any her surviving, and in default of such issue to convey and transfer the said stock or its proceeds to my next of kin; and upon the further trust, if the said Eleanor shall have died before me without having married, or shall during my lifetime marry without my consent, then to reconvey and retransfer the said stock or its proceeds to me; and upon the further trust, on my direction at any time during my lifetime, or in his discretion after my death, to convert the said stock into money by sale thereof, and after such conversion to invest the proceeds thereof in his discretion in other stocks or upon a bond or mortgage at interest, to be held on the like trusts and subject to the like powers of conversion as the stock hereby transferred, and the dividends and profits thereof; reserving to myself the power at any time in writing, by will or otherwise, to direct and compel the said Samuel Lord to transfer the said stock or the proceeds thereof to the said Eleanor, for her own use and benefit absolutely, and also reserving to myself the power, in case of the death of the said Samuel Lord before me, of appointing another or other trustee or trustees in his place and stead. And I, the said Samuel Lord, do consent and agree to accept this transfer; and I hereby covenant and agree to and with the said Thomas Medley and the said Eleanor Rainey Dudgeon, severally and respectively, and their several and respective legal representatives, that I will observe, perform, fulfil, and keep the trusts and conditions hereinbefore declared."

This deed poll was under the hand and seal both of Thomas Medley and of the defendant Samuel Lord. At the time of the execution of the deed poll, Samuel Lord held a power of attorney from Thomas Medley, whereby Medley empowered him "to take possession, charge, and control of all his goods, chattels, books of account, evidences of debt, choses in action, and claims of every kind, to buy and to sell and to transfer the stock of any incorporated company now belonging to him, or which might thereafter belong to him, and to collect and receive the dividends," and gave him general authority to act on his behalf. Soon after the execution of the deed poll, Thomas Medley delivered to the defendant Lord the scrip for one hundred and sixty-two shares which he then held in the Bank of Louisiana, including the scrip for the fifty shares comprised in the deed of settlement. About the same time, Medley gave to the defendant Lord a further power of attorney, authorizing him to receive the dividends then due and payable, and which might thereafter become due and payable, on all or any shares of the capital stock of the Bank of Louisiana then standing, or which might thereafter be placed in his name in the books of the said Bank of Louisiana, and to give receipts, discharges, and acquittances for the same, with power to the said attorney to substitute an attorney or attorneys under him for all or any of the purposes aforesaid, and to do all lawful acts requisite for affecting the premises.

According to the constitution of the Bank of Louisiana, the shares in the bank were transferable in the books of the company, and all transfers were to be made by the proprietor or his lawful attorney, the certificates of stock being surrendered at the time the transfer was made; but it was to be collected from the evidence in the cause, that, where a transfer was made by power of attorney, the power of attorney had to be left with the bank. No transfer was ever made into the name of the defendant Lord of the fifty shares comprised in the settlement; but the dividends upon the shares appeared to have been received by Lord, and remitted by him to the plaintiff Mrs. Milroy, then Eleanor Rainey Dudgeon, sometimes directly and sometimes through the medium of the settlor, by whom they were paid over to her, except as to one dividend, which appeared not to have been so paid over. The thirteen North American fire insurance shares were purchased, as it appeared, paid to Mrs. Milroy, then Eleanor Rainey Dudgeon, along with the dividends upon the bank shares; but these insurance shares were purchased in the name of Thomas Medley.

In the year 1855, the plaintiffs intermarried, with the consent and approbation of Thomas Medley. In the month of November in that year Thomas Medley died, having by his will bequeathed to the plaintiff E. R. Milroy a legacy of £4,000, and appointed the defendant J. A. Otto to be his executor, who duly proved his will. After his death, the defendant Lord delivered to Otto the certificates both for the fifty Louisiana bank shares and for the thirteen North American fire insurance shares. The plaintiff E. R. Milroy was the niece of Thomas Medley. She was educated at his expense, and lived with him after she was grown up until the summer of the year 1852, in the spring of which year he married the daughter of the defendant Samuel Lord. The settlement which the bill sought to enforce was made in consequence of that marriage, and of the plaintiff E. R. Milroy then ceasing to live with the settlor, and as a provision for her; and she was told by Thomas Medley that he had made the settlement on that account and for that purpose.

The Vice Chancellor Stuart, at the hearing of the cause, and of a petition presented in it and under the trustee act, made a decree declaring that the fifty shares in the Bank of Louisiana were bound by the trusts declared by the deed poll of the 2d April, 1852, and that the thirteen shares in the North American Fire Insurance Company, in the bill mentioned, belonged to the plaintiffs in right of the plaintiff Eleanor Rainey Milroy, the same having been purchased before her marriage with moneys belonging to her. The decree proceeded to appoint a new trustee, and to order the defendant Otto, as executor of the will of the settlor, to transfer the fifty shares in the Bank of Louisiana into the joint names of Lord and the new trustee,

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to be held by them upon the trusts of the said deed poll, and also to transfer the thirteen shares in the North American Fire Insurance Company into the name of the plaintiff Andrew Row M'Taggart Milroy, for his own use. It was further ordered that the amount of the dividends accrued since the decease of Medley upon the fifty shares in the Bank of Louisiana, up to the time of the transfer, should be paid by Otto to Lord and the new trustee, to be also held by them upon the trusts of the deed poll; and that the amount of the dividends accrued since the decease of Medley upon the thirteen shares should be paid to the plaintiff Andrew Row M'Taggart Milroy, for his own use. The costs of the suit were ordered out of Medley's estate.

The defendant Otto appealed from this decree.

Mr. Craig and *Mr. Charles Hall*, for the plaintiffs, in support of this decree.

Mr. Cotton, (*Mr. Bacon* with him,) for the appellant.

Mr. Malins and *Mr. Kekewich*, for Lord. *Judgment reserved.*

July 26. THE LORD JUSTICE TURNER,[1] after stating the facts of the case nearly in the same terms as above, proceeded as follows: —

Under the circumstances of this case, it would be difficult not to feel a strong disposition to give effect to this settlement to the fullest extent, and certainly I have spared no pains to find the means of doing so, consistently with what I apprehend to be the law of the court; but, after full and anxious consideration, I find myself unable to do so. I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds in trust for those purposes; and, if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases, I think, go further to this extent, that, if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust; for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried.

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[1] The concurring opinion of Lord Justice Knight Bruce is omitted, as well as the arguments of counsel. — ED.

Applying, then, these principles to the case, there is not here any transfer either of the one class of shares or of the other to the objects of the settlement; and the question, therefore, must be, whether a valid and effectual trust in favor of those objects was created in the defendant Samuel Lord, or the settlor himself, as to all or any of these shares. Now, it is plain that it was not the purpose of this settlement, or the intention of the settlor, to constitute himself a trustee of the bank shares. The intention was that the trust should be vested in the defendant Samuel Lord; and I think, therefore, that we should not be justified in holding that, by the settlement or by any parol declaration made by the settlor, he himself became a trustee of these shares for the purposes of the settlement. By doing so, we should be converting the settlement or the parol declaration to a purpose wholly different from that which was intended to be effected by it, and, as I have said, creating a perfect trust out of an imperfect transaction.

His Honor the Vice Chancellor seems to have considered that the case *Ex parte* Pye warranted the conclusion that the settlor himself became a trustee by virtue of the power of attorney which he had given to the defendant Samuel Lord; but in *Ex parte* Pye the power of attorney was given by the settlor for the express purpose of enabling the annuity to be transferred to the object of the settlor's bounty. The settlor had, it appears, already directed the annuity to be purchased for the benefit of that object, and had even paid over the money for the purpose of its being applied to the purchase of the annuity; and then, when the annuity was, from the necessity of the case, purchased in the settlor's name, all that possibly could be wanted was to show that the original purpose was not changed, and that the annuity, though purchased in the settlor's name, was still intended for the benefit of the same object of the settlor's bounty; and the power of attorney proved, beyond all doubt, that this was the case. These facts appear to me wholly to distinguish this case from the case of *Ex parte* Pye. In my opinion, therefore, this decree cannot be supported upon the authority of *Ex parte* Pye; and there does not appear to me to be any sufficient ground to warrant us in holding that the settlor himself became a trustee of these bank shares for the purposes of this settlement.

The more difficult question is, whether the defendant Samuel Lord did not become a trustee of these shares. Upon this question I have felt considerable doubt; but, in the result, I have come to the conclusion that no perfect trust was ever created in him. The shares, it is clear, were never legally vested in him; and the only ground on which he can be held to have become a trustee of them is, that he held a power of attorney under which he might have transferred them into his own name; but he held that power of attorney as the agent of the settlor; and if he had been sued by the plaintiffs as trustee of the settlement for an account under the trust, and to compel him to transfer the shares into his own name as trustee, I think he might well have said: These shares are not vested in me; I have no power over them,

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except as the agent of the settlor; and without his express directions, I cannot be justified in making the proposed transfer, in converting an intended into an actual settlement. A court of equity could not, I think, decree the agent of the settlor to make the transfer, unless it could decree the settlor himself to do so; and it is plain that no such decree could have been made against the settlor. In my opinion, therefore, this decree cannot be maintained as to the fifty Louisiana Bank shares.

As to the thirteen North American fire insurance shares, the case seems to me to stand upon a different footing. Although the plaintiffs' case fails as to the capital of the bank shares, there can, I think, be no doubt that the settlor made a perfect gift to Mrs. Milroy, then Miss Dudgeon, of the dividends upon these shares, so far as they were handed over or treated by him as belonging to her; and these insurance shares were purchased with dividends which were so handed over or treated. It seems to me, upon the evidence, that these shares were purchased with the money of Mrs. Milroy, then Miss Dudgeon, and that the purchase having been made in Thomas Medley's name, there would be a resulting trust for Miss Dudgeon. I think, therefore, that as to these shares the decree is right, — the value of the shares being, as I presume, under £200, so that the case does not fall within the ordinary rule of the court as to the wife's equity for a settlement.

The case being thus disposed of as to the title to the shares, I see no ground for the claim to compensation raised by this bill. The certificates for the shares would follow the legal title, and as to the fifty bank shares would therefore belong to the defendant J. A. Otto, and as to the thirteen insurance shares the plaintiffs recovering those shares must recover the certificates also; but this not being provided for by the decree, a direction for the delivery of these certificates should, I think, be added.

Upon the hearing of this appeal, it was contended for the plaintiffs that, so far as they might fail in recovering any of the shares in question, they were entitled to recover the value of them against the estate of Thomas Medley. I am not sure that this point can properly be considered to be open upon these pleadings; but, whether it be so or not, I agree with my learned brother that the plaintiffs' claim in this respect cannot be maintained. There is no express covenant in the settlement; and whatever might be done as to implying a covenant to do no act in derogation of the settlement, it would, I think, be going too far to imply a covenant to perfect it. If there be a breach of any implied covenant by the delivery of the certificates to the defendant J. A. Otto, the plaintiffs' remedy sounds in damages, and they may pursue that remedy at law; for which purpose, if the plaintiffs desire it, there may be inserted in the decree a direction that they be at liberty to use the name of the defendant Lord, — of course upon the usual terms of indemnifying him. I have not adverted to the point which was raised as to this case being governed by the Spanish law; for I think that, if that law was more favorable to the plaintiffs, the onus was upon them to allege and prove it. As to the costs of the suit, my learned brother being of opinion that they ought to be paid out of the settlor's estate, I do not dissent. The decree must be altered accordingly, as to the several points to which I have referred.[1]

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[1] The doctrine of the principal case, that an intended gift of shares cannot be converted into an unintended trust, has been repeatedly affirmed. Antrobus *v.* Smith, 12 Ves. 39; Searle *v.* Law, 15 Sim. 95; Dillon *v.* Coppin, 4 My. & Cr. 647; Weale *v.* Ollive, 17 Beav. 252; Beech *v.* Keep, 18 Beav. 285; Lambert *v.* Overton, 11 L. T. Rep. 503; 11 W. R. 217 s. c.; Moore *v.* Moore, 18 Eq. 474; Heartley *v.* Nicholson, 19 Eq. 233; *Ex parte* Todd, 19 Q. B. Div. 186; West *v.* West, L. R. 9 Ir. 121; Pennington *v.* Gitting, 2 Gill & J. 208; Baltimore Co. *v.* Mali, 65 Md. 93.

But, on the other hand, a registration of the transfer on the books of the company is not essential to the validity of a gift of shares. A delivery of the certificates, coupled with the execution of an express power of attorney to the donee to transfer the shares on the company's books, makes him substantially *dominus* of the shares, since he needs no further assistance from the donor, and can compel registration by the company. Milroy *v.* Lord, *supra*, 153, 154 (*semble*); Kiddill *v.* Farrell, 3 Sm. & G. 428, West *v.* West, L. R. 9 Ir. 121, 126; Stone *v.* Hackett, 12 Gray, 227; Walker *v.* Dixon Co., 47 N. J. Eq. 342; Matthews *v.* Hoagland (N. J Eq. 1891), 21 Atl. R. 1054; Cushman *v.* Thayer Co., 76 N. Y 365. The case of Weale *v.* Ollive, 17 Beav. 252, is *contra*, but the authority of Lord Romilly's decision in this case seems to have been unconsciously discarded by himself in Pearson *v.* Amicable Co., 27 Beav. 229, *supra*, p. 139, n. 1. See also Woodford *v.* Charnley, 28 Beav. 96, 101. In Pennington *v.* Gittings, 2 Gill & J. 208, a bill by the donee against the executor of the donor to compel a transfer on the books of the company was rightly dismissed. But the case has been treated, in Maryland, as deciding that there cannot be a valid gift of shares unless the transfer is made on the books of the company, and that the donee cannot compel registration by a proceeding against the company. Baltimore Co. *v.* Mali, 65 Md. 93

A deed of transfer, with an express power of attorney, should be as effectual as a delivery of the certificates. It was so decided in Grymes *v.* Hone, 49 N. Y. 17 (a *donatio mortis causa*). Bizzey *v.* Flight (a gift *inter vivos*) is *contra*; but this case can hardly stand with *Re* Patrick, '91, 1 Ch. 82. 24 Ky. Rep. 957.

Nor is an express power of attorney indispensable. A delivery of the certificates as a gift carries by necessary implication a power to transfer the shares on the company's books, and this implied power is as effectual as an express power to give the donee dominion over the shares, whether the transaction be a gift *inter vivos*: Allerton *v.* Lang, 10 Bosw. 362; Ridden *v.* Thrall, 125 N. Y. 572, 577 (*semble*); Commonwealth *v.* Crompton, 137 Pa. 138 (but see, *contra*, Matthews *v.* Hoagland [N. J. Eq., 1891], 21 Atl. R. 1054); or a *donatio mortis causa*: Walsh *v.* Sexton, 55 Barb. 251.

A deed of transfer should have the same effect as a delivery. But no authorities have been found on this point. See *supra*, p. 139, n. 1; p. 145, n. 1; *infra*, p. 163, n. 4.

An attempted gift of certificates of stock by a husband to his wife, whether by deed or delivery, is of course inoperative at common law, and should be equally so in equity. Such is the law in England. Moore *v.* Moore, 18 Eq 474. But in this country, such a transaction not being regarded as a gift, but as a contract founded upon a meritorious consideration, the wife would probably be treated as having the equitable interest in the shares. See *supra*, p. 140, n. 1; *infra*, p. 175, n. 1.

Savings Bank Books. — There seems to be a strong analogy between a depositor's savings bank book and a stock certificate, and, as might be expected, the requisites of a gratuitous transfer are the same for each. Thus, a delivery of the book with an express power of attorney to collect the money gives the donee an irrevocable right to the fund. *Gifts inter vivos*: Savings Bank *v.* Fogg, 82 Me. 538, 541 (*semble*); Kimball *v.* Leland, 110 Mass. 325; Foss *v.* Lowell Bank, 111 Mass. 285; Davis *v.* Ney, 125 Mass. 390; Penfield *v.* Thayer, 2 E. D. Sm. 305 (see Curry *v.* Powers, 70 N. Y. 212);

59 N.J. Eq. 199:

RICHARDSON *v.* RICHARDSON.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V.C., FEBRUARY 15, 1867.

[*Reported in Law Reports*, 3 *Equity*, 686.]

FEB. 26. SIR W. PAGE WOOD, V. C.[1] The sole question in this case is, whether a legatee, under the will of the testator, Richard Richardson, of a sum of £1,250, ought or ought not to submit to a deduction of £450, in respect of two promissory notes given by him to his sister, which involves the further question whether the testator was or was not the absolute owner of the notes. If he was the owner, though he demanded no interest upon the notes, and made no application for pay-

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Providence Inst. *v.* Taft, 14 R. I. 502. *Donationes causa mortis:* Sheedy *v.* Roach, 124 Mass. 472; Ridden *v.* Thrall, 125 N. Y. 572.

The same is true of a delivery by way of gift without an express power of attorney. *Gifts inter vivos:* Camp's Appeal, 36 Conn. 88; Schollmier *v.* Schoendelen, 78 Iowa, 426; Hill *v.* Stevenson, 63 Me. 364; Penfield *v.* Thayer, 2 E. D. Sm. 305; Hoar *v.* Hoar, 5 Redf. 637 (*semble*); (compare Curry *v.* Powers, 70 N. Y. 212;) Providence Inst. *v.* Taft, 14 R. I. 502. *Donationes causa mortis:* Drew *v.* Hagerty, 81 Me. 231 (*semble*); Pierce *v.* Boston Bank, 129 Mass. 425; Fiero *v.* Fiero, 5 Th. & C. 151 (*semble*); Tillinghast *v.* Wheaton, 8 R. I. 536; Case *v.* Dennison, 9 R. I. 88 (*semble*); Dean *v.* Dean, 43 Vt. 337 (*semble*).

But see, *contra*, McGonnell *v.* Murray, Ir. R. 3 Eq. 460 (*semble*); Murray *v.* Cannon, 41 Md. 466; (see Dougherty *v.* Moore, 71 Md. 248, 251;) Walsh's Appeal, 122 Pa. 177. The decision in this Pennsylvania case was the result of a peculiar conception of the nature of a savings bank book, the court apparently treating it like a depositor's pass-book, which is altogether different from a stock certificate. Beak *v.* Beak, 13 Eq. 489; Ashbrook *v.* Ryan, 2 Bush, 228.

BANK DEPOSIT RECEIPT OR NOTE. — A depositor in a bank, who takes a receipt or non-negotiable note for the same, to be presented on payment, should be able to make a gift of the same as freely as the holder of a savings bank book. In this country a delivery of the receipt or note would perfect the gift whether *inter vivos* or *mortis causa.* In England, delivery would be enough in the case of a *donatio mortis causa.* Moore *v.* Darton, *supra*, 39; Amis *v.* Witt, 33 Beav. 619, 1 B. & S. 109; Moore *v.* Moore, 18 Eq. 474; *Re* Dillon, 44 Ch. Div. 76; Cassidy *v.* Belfast Co., 22 L. R. Ir. 68 (but see M'Gonnell *v.* Murray, Ir. R. 3 Eq. 470); M'Cabe *v.* Robertson, 18 U. C. C. P. 470 (*semble*); (but see *Ex parte* Gerow, 5 All. N. B. 512). But it seems to be thought that delivery *inter vivos* would not give the donee the deposit. *Re* Dillon, 44 Ch. Div. 76 (*semble*); Moore *v.* Ulster Bank, Ir. R. 11 C. L. 517; M'Cabe *v.* Robertson, 18 U. C. C. P. 470 (*semble*). In Scotland, a written assignment is essential even in the case of *donatio mortis causa.* M'Nicol *v.* M'Dougall, 17 Ct. of Sess. (1890), 25.

Even in jurisdictions where the gift is ineffectual unless the shares, or deposit, are transferred on the books of the company or savings bank, the donor would not be allowed to recover the certificate or bank-book after he had once delivered them with the intention of vesting them in the donee. See *supra*, p. 140, n. 1; p. 145, n. 1; *infra*, p. 162, n. 4; and also Walsh *v.* Saxton, 55 Barb. 251. We should have, then, this extraordinary condition of things: the donee unable to transfer the shares or collect the deposit, because the gift is not deemed complete; the donor equally helpless, because he cannot produce the certificate or bank-book; the company or bank, on the other hand, in a position capriciously to recognize either the donor or the donee as *dominus* of the claim, or, indeed, unless they come to some compromise, to refuse with safety to recognize either. — ED.

[1] See *supra*, p. 70, n. 1. — ED.

ment of them, yet, as is conceded, the Statute of Limitations cannot be set up; and the plaintiff must be considered as having received, on account of his legacy, so much of the assets of the testator as his debt amounted to.

Whether or not the notes were the property of the testator depends upon a certain voluntary assignment,[1] whereby the sister, shortly before her death, assigned the whole of her personal estate to her brother, the testator; and in the same instrument she gave him a power of attorney to ask, sue for, and recover the thereby assigned moneys and premises, and to do and execute such further acts and deeds as should be deemed necessary for deriving the full benefit of the assignment.

Now, there is no specific description in the deed of the promissory notes; and, if they passed at all, they passed under the description of "all other the personal estate and effects, whatsoever and wheresoever," of Elizabeth Richardson. She did not indorse the notes; and the defendants, the executors, by their answer, say they believe that, if she had not died so soon, the testator would have applied to her to indorse the notes, but she did not do so. The questions are: first, whether they passed by the deed at all; and, secondly, if they passed, whether they passed to the testator as trustee, or in his own right.

After the decision in Kekewich *v.* Manning,[2] I think it is impossible to contend that these notes did not pass by this instrument, because the rule laid down in that case, the decision in which was supported by reference to *Ex parte* Pye, was not confined merely to this, that a person who, being entitled to a reversionary interest, or to stock standing in another's name, assigns it by a voluntary deed, thereby passes it, notwithstanding that he does not in formal terms declare himself to be trustee of the property; but it amounts to this, that an instrument executed as a present and complete assignment (not being a mere covenant to assign on a future day) is equivalent to a declaration of trust.) repeated

It is impossible to read the argument in that case, and the judgment of Lord Justice Knight Bruce, without seeing that his mind was directed to Meek *v.* Kettlewell,[3] and that class of cases, where it had been held (such was the nicety upon which the decisions turned) that an actual assignment is nothing more than an agreement to assign in equity, because it merely passes such equitable interest as the assignor may have; and some further step must be taken by the assignee to acquire the legal interest. That further step being necessary, the assignment was held to be in truth nothing but an agreement to assign, and, being so, was not enforceable in this Court, — the Court having often decided that it will not enforce a mere voluntary agreement.

The distinction, undoubtedly, was very fine between that and a declaration of trust; and the good sense of the decision in Kekewich *v.*

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[1] This assignment was under seal, and the notes were delivered to the testator — ED.

[2] 1 D. M. & G. 176.

[3] 1 Hare, 464.

45 Hun. 30
29 " 466
56 Vt 187
149 Ind 589

Manning, I think, lies in this, that the real distinction should be made between an agreement to do something when called upon, something distinctly expressed to be future in the instrument, and an instrument which affects to pass everything, independently of the legal estate. It was held in Kekewich *v.* Manning that such an instrument operates as an out-and-out assignment, disposing of the whole of the assignor's equitable interest, and that such a declaration of trust is as good a form as any that can be devised. The expression used by the Lords Justices is this: "A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument."

In that case, reference was made in the argument principally to the case of *Ex parte* Pye, which was a decision of Lord Eldon to the same effect. Reliance is often placed on the circumstance that the assignor has done all he can, — that there is nothing remaining for him to do; and it is contended that he must, in that case only, be taken to have made a complete and effectual assignment. But that is not the sound doctrine on which the case rests; for, if there be an actual declaration of trust, although the assignor has not done all that he could do, — for example, although he has not given notice to the assignee, — yet the interest is held to have effectually passed as between the donor and donee. The difference must be rested simply on this: aye or no, has he constituted himself a trustee?

In *Ex parte* Pye, the testator had written to one Dubost, authorizing him to purchase in France an annuity for the benefit of a lady named Garos, for her life, with power to draw on him for £1,500 for such purchase. The agent, finding the lady was a married woman, exercised his own discretion, and bought the annuity in the name of the testator. Then, shortly before his death, the testator sent to Dubost, by his desire, a power of attorney authorizing him to transfer the annuity to the lady. The testator died before anything more was done; and, after his death, the annuity was transferred. There was a question whether, by the law of France, the exercise of a power of attorney by the person to whom it is given, without knowledge of the death of his principal, is good. I think the Master found that it was so; but Lord Eldon expressly declined to reply upon that, as he says in his judgment: "These petitions" (the question came on upon petition) "call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the Court. With regard to the French annuity, the Master has stated his opinion as to the French law, — perhaps without sufficient authority, or sufficient inquiry into the effect of it, — as applicable to the precise circumstances of this case; but it is not necessary to pursue that, as upon the documents before me it does appear that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant."

Now, the testator had done nothing more than execute the power of attorney. It is true, he had written a letter directing the stock to be purchased in the lady's name; but that was not done; it was purchased in his name. The decision, therefore, could only be rested upon this, that this was not an agreement to assign, not an agreement to become a trustee at some future period, but an actual constitution by the testator of himself as trustee.

Following, therefore, Kekewich *v.* Manning, I must regard this instrument as having effectually assigned the promissory notes, although they were not indorsed. The instrument is an actual assignment, with a power immediately vested in the assignee to make himself master of the property; and I do not know in what way the assignor could have more effectually declared that she was a trustee of that property for Richard Richardson.

3 Hare 539
136 Mass. 138 Contra.

BENJAMIN GROVER, ADMINISTRATOR, *v.* CHARLES W. GROVER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER 17, 1835, MARCH 20, 1837.

117 Fed. 7

[*Reported in* 24 *Pickering*, 261.]

29 Ch. 3

ASSUMPSIT upon a promissory note made by the defendant, and payable to the order of Hiram S. Grover, the plaintiff's intestate.

At the trial, before Putnam, J., it appeared that in March, 1832, Grover V. Blanchard called to see the intestate. Upon an inquiry being made, whether the intestate had put on record a deed of mortgage given to secure the payment of the note in question, the intestate produced the deed, which had not then been recorded, and the note, and said to Blanchard, "I will make a present of these to you, if you will accept them." Blanchard then took them and put them in his pocket, saying that he would accept them as a token of love, or affection, or respect. Before they parted, Blanchard handed them back to the intestate, saying to him, "You may keep the papers until I call for them, or collect them for me." No assignment was made on the note or mortgage. Afterwards the intestate put the mortgage deed on record. The plaintiff, after the death of the intestate, in October, 1832, took the deed from the register's office, and, having received of the defendant payment of the amount secured thereby, discharged the mortgage. Upon the death of the intestate, the note was found in his chest, with his papers; and Blanchard took it, refused to deliver it to the plaintiff, and caused this action to be brought.

The defendant contended: 1. That no valid gift of a chose in action could be made *inter vivos* without writing; 2. That the name of the donor, or of the administrator or executor of the donor, could not be used without his consent, in an action brought for the use of the donee;

H. S. Grover gv Blanchard a nt & mortg deed & Blanchard gv it bck to him to kp or to clct f him. N assignmt w md on ei e mortg or e nt. Blanchd refused to gv up e nt to wh he h gt possn & this actn w brought by Grover's admr. Held: E gft w vld & Blanchd h an irrevoc and, 3. That the donor could not, by law, act as the agent of the donee to keep the papers or collect the money.

The jury found that the intestate did intend to give the property contained in the note and mortgage, absolutely, to Blanchard.

The whole court were to determine, upon these facts, whether or not the property passed and vested in Blanchard, and whether or not he might maintain this action without the consent of the nominal plaintiff, for his own use, under the facts and circumstances above stated.

Keyes and *Farley*, for the defendant.[1]

Hoar, for the plaintiff.

WILDE, J., delivered the opinion of the Court. The jury have found that the deceased intended to give the property in the note, and in the mortgage made to secure it, absolutely, to Blanchard; and the question is, whether by the rules of law this intention can be carried into effect.

It is objected that no valid gift of a chose in action can be made *inter vivos*, without writing, and this objection would be well maintained, if a legal transfer of a chose in action were essential to give effect to a gift. But as a good and effectual equitable assignment of a chose in action may be made by parol, and as courts of law take notice of and give effect to such assignments, there seems to be no good foundation for this objection. It is true that the cases, which are numerous, in which such equitable assignments have been supported, are founded on assignments for a valuable consideration; but there is little, if any, distinction in this respect between contracts and gifts *inter vivos;* the latter, indeed, when made perfect by delivery of the things given, are executed contracts. 2 Kent's Comm. (3d ed.) 438. By delivery and acceptance the title passes, the gift becomes perfect, and is irrevocable. There is, therefore, no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase. And so we think that a gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale.

The cases favorable to the defence do not depend on the question whether an assignment must be in writing, but on the question whether a legal transfer is not necessary to give validity to a donation of a chose in action. The donation of a note of hand payable to bearer, or of bank-notes, lottery tickets, and the like, where the legal title passes by delivery, is good; for by the form of the contract no written assignment is necessary; but as to all other choses in action, negotiable securities excepted, it has been held in several cases that they are not subjects of donation *mortis causa*, on the ground, undoubtedly, for I can imagine no other, that a legal assignment is necessary to give effect to such donations; and the same reason would apply to donations *inter vivos.* The leading case on this point is that of Miller *v.* Miller,[2] in which it was held that the gift of a note, being a mere chose in action, could not take effect as a donation *mortis causa*, because no property therein could pass by delivery, and an action thereon must be sued in the name of the executor. But in Snellgrave *v.* Bailey,[1] Lord Hardwicke decided that the gift and delivery over of a bond was good as a donation *mortis causa*, on the ground that an equitable assignment of the bond was sufficient. It seems to be very difficult to reconcile the two cases. The distinction suggested by Lord Hardwicke in the case of Ward *v.* Turner,[2] in which he adheres to the decision in Snellgrave *v.* Bailey, is technical, and, to my mind, unsatisfactory; and certainly has no application to our laws, which place bonds and other securities on the same footing. We cannot, therefore, adopt both decisions without manifest inconsistency; and we think, for the reasons already stated, that the decision in Snellgrave *v.* Bailey is supported by the better reasons, and is more conformable to general principles, and the modern decisions in respect to equitable assignments. We are, therefore, of opinion that the gift of the note of hand in question is valid; and in coming to this conclusion we concur with the decision in the case of Wright *v.* Wright,[3] wherein it was held that the gift and delivery over of a promissory note, *mortis causa*, is valid in law, although the legal title did not pass by the assignment.

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[1] The arguments of counsel are omitted. — ED.

[2] 3 P. Wms. 356.

It is not necessary to decide whether the gift of the mortgage security is valid, although it is reported to have been said by the Vice Chancellor, in the case of Duffield *v.* Elwes,[4] that a mortgagor was not compellable to pay the mortgage debt without having back the mortgage estate; and for that and other reasons he decided that a mortgage was not a subject of a gift *mortis causa*. This decision, however, was afterwards overruled in the House of Lords, Duffield *v.* Elwes,[5] on the ground that the gift of the debt operated as an equitable assignment of the mortgage. But as we think it clear that the right to maintain this action does not depend on that question, we give no opinion in regard to it.

Another objection is, that if the gift was valid and complete, by the delivery of the note, it was annulled by the redelivery to the donor. We think this objection also is unfounded. In the case of Bunn *v.* Markham,[6] Gibbs, C. J. lays it down as a well settled principle, that if after a donation *mortis causa* the donor resumes possession, he thereby revokes and annuls the donation. This is the law, no doubt. Whether there may not be an exception to this rule, when the donor takes back the thing given at the request of the donee, for a particular purpose, and agrees to act as his agent under circumstances negativing every presumption that he intended to revoke his gift, is a question which it is not necessary now to consider; for the principle has no relation to a donation *inter vivos*. When such a donation is completed by delivery, the property vests immediately and irrevocably in the donee; and the donor has no more right over it than any other person. But a donation *mortis causa* does not pass a title immediately, but is only to take effect on the death of the donor, who in the mean time has the power of revocation, and may at any time resume possession and annul the gift.

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[1] 3 Atk. 214.
[2] 2 Ves. Sen. 431.
[3] 1 Cowen, 598.
[4] 1 Sim. & Stu. 243.
[5] 1 Bligh N. R. 497.
[6] 7 Taunt. 230.

The last objection to the maintenance of this action by Blanchard, in the name of the administrator, has been sufficiently answered in considering the first objection. It is contended that the consent of the administrator is necessary. But if an equitable assignment is sufficient to complete the gift, it follows that the administrator is trustee, and cannot set up his legal right in order to defeat the trust. This is fully established by the cases of Duffield *v.* Elwes,[1] Hunt *v.* Beach,[2] and Duffield *v.* Hicks.[3]

Judgment for plaintiff for the use of Blanchard.[4]

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[1] 1 Bligh N. R. 497.

[2] 5 Madd. Ch. 351.

[3] 1 Dow, 1.

[4] *Gifts inter Vivos.* Jones *v.* Deyer, 16 Ala. 221, 225 (*semble*); O'Connor *v.* McHugh, 89 Ala. 531; McHugh *v.* O'Connor, 91 Ala. 243 (*semble*); Buschian *v.* Hughart, 28 Ind. 449 (*semble*); Gammon Seminary *v.* Robbins, 128 Ind. 85 (*semble*); Meriwether *v.* Morrison, 78 Ky. 572; Wing *v.* Merchant, 57 Me. 383; Trowbridge *v.* Holden, 58 Me. 117; Hale *v.* Rice, 124 Mass. 292; Lyle *v.* Burke, 40 Mich. 499; Malone *v.* Doyle, 56 Mich. 222 (*semble*); Marston *v.* Marston, 21 N. H. 491; Westerlo *v.* De Witt, 36 N Y. 340 (*semble*); Mack *v.* Hun, 3 Hun, 323; Montgomery *v.* Miller, 3 Redf. 154 (*semble*); Scott *v.* Lanman, 104 Pa. 593 (*semble*); Horner's App., 2 Pennyp. 289 (*semble*); Hopkins *v.* Manchester, 16 R. I. 663; Brunson *v.* Brunson, Meigs, 630; Carpenter *v.* Dodge, 20 Vt. 595 (*semble*); Wilson *v.* Carpenter, 17 Wis. 512 (*semble*); Rupert *v.* Johnston, 40 U. C. Q. B. 11, 16 (*semble*) *Accord.*

Lee *v.* Magrath, L. R. 10 Ir. 313; Hitch *v.* Davis, 3 Md. Ch. 266 *Contra.*

In Fairly *v.* McLean, 11 Ired. 158; Brickhouse *v.* Brickhouse, 11 Ired. 404; and Overton *v.* Sawyer, 7 Jones (N. Ca.), 6, the donor of a note was allowed to maintain trover against the donee. But these cases, which are plainly erroneous, *supra*, p. 140, n. 1, p. 145, n. 1, p. 156, n. 1, are no longer law, even in North Carolina. Kiff *v.* Weaver, 94 N. Ca. 274, 277, 278.

If a note is secured by mortgage, a delivery of the note by way of gift will give the donee the equitable interest in the mortgage as an incident. O'Connor *v.* McHugh, 89 Ala. 531; McHugh *v.* O'Connor, 91 Ala. 243. But see, *contra*, Tiffany *v.* Clark, 6 Grant, Ch. 474, 481. On the other hand, a delivery of the mortgage deed without the note gives the donee no interest in the note. See cases just cited.

Gifts mortis causa. Rankin *v.* Weguelin, 27 Beav. 309; Veal *v.* Veal, 27 Beav. 303; Amis *v.* Witt, 33 Beav. 619, 1 B. & S. 109; Moore *v.* Moore, 18 Eq. 474; *Re* Taylor, 56 L. J. Ch. 597; *Re* Farman, 57 L. J. Ch. 637; Austin *v.* Mead, 15 Ch. D. 651; Clement *v.* Cheeseman, 27 Ch. D. 631; *Re* Dillon, 44 Ch. Div. 76: Cassidy *v.* Belfast Co., 22 L. R. Ir. 68; Blain *v.* Terryberry, 9 Grant, Ch. 286; Basket *v.* Hassell, 107 U. S. 602 (*semble*); Jones *v.* Deyer, 16 Ala. 221; Connor *v.* Root, 11 Col. 183; Brown *v.* Brown, 18 Conn. 410; Turpin *v.* Thompson, 2 Met. (Ky.) 420; Ashbrook *v.* Ryon, 2 Bush, 228; Southerland *v.* Southerland, 5 Bush, 591; Borneman *v.* Sidlinger, 15 Me. 429; 21 Me. 185; Sessions *v.* Moseley, 4 Cush. 87; Bates *v.* Kempton, 7 Gray, 382; Chase *v.* Redding, 13 Gray, 418; Coutant *v.* Schuyler, 1 Paige, 316; Westerlo *v.* De Witt, 36 N. Y. 340; Gourley *v.* Linsenbigler, 51 Pa. 345 (*semble*); Overton *v.* Sawyer, 7 Jones (N. Ca.), 6 (*semble*); Brunson *v.* Brunson, Meigs, 630; Caldwell *v.* Renfrew, 33 Vt. 213 *Accord.*

A gift accompanied by delivery is effectual in the case of other documents in the nature of specialty obligations, e. g.: —

LOTTERY TICKETS.

Gift inter vivos. Grangiac *v.* Arden, 10 Johns. 293.

Gift mortis causa. Gold *v.* Rutland, 1 Eq. Ab. 346.

100 Ala. 438
58 N. H. 429
169 N. Y. 42 – contra to Gr. G.

16 Vt. 558 semble
13 Mass. 304 " (dictum)

EXCHEQUER TALLY.

Gift mortis causa. Jones *v.* Selby, Prec. Ch. 300 (*semble*).

A deed of gift of a note, a ticket, tally, and the like, is as effectual as delivery. Blakeley *v.* Brady, 2 Dr. & Walsh, 311 (*semble*); Walker *v.* Crews, 73 Ala. 412 (overruling Borum *v.* King, 37 Ala. 606). — ED.

Gift of parol choses in action. If a chose in action is not in the form of a common law or mercantile specialty, so that there is no document to pass by delivery or deed, a gift of it by the obligee is so far operative as a power of attorney, that the obligor cannot set up the gratuitous character of the assignment against the donee. Walker *v.* Bradford Bank, 12 Q. B. D. 511; Harding *v.* Harding, 17 Q. B. D. 442; Richardson *v.* Mead, 27 Barb. 178; Merrick *v.* Brainard, 38 Barb. 574; Allen *v.* Brown, 51 Barb. 86; Buxton *v.* Barrett, 14 R. I. 40. But see, *contra*, Note, Brownlow, 40; Patterson *v.* Williams, Ll. & G. t. Pl. 95; Hill *v.* Sheibley, 64 Ga. 529; Tallman *v.* Hoey, 89 N. Y. 537 (*semble*). It seems to be conceded, however, that the donor may revoke the power of attorney. The reason for this concession is not obvious. If warranted, the donor's death should likewise revoke the power of attorney. There are decisions to this effect: Sewell *v.* Moxsy, 2 Sim. N. S. 189; *Re* Richardson, 30 Ch. Div. 396; Smither *v.* Smither, 30 Hun, 632 (*semble*, reversing S. C. 1 Dem. 399). But there are also decisions to the contrary: Airey *v.* Hall, 3 Sm. & G. 315, 324; De Caumont *v.* Bogert, 36 Hun, 382; Read *v.* Long, 4 Yerg. 68. — ED.

61 N.Y. 6
82 Ga. 4

In N.Y. & Tex an asgmt und se of a pal chos in actn acts as an irrevocable pow of atty. 101 N.Y. 179; 94 Tex. 526, 5

SLANNING AND OTHERS *v.* STYLE AND *e Contra.*

IN CHANCERY, BEFORE LORD TALBOT, C., MICHAELMAS TERM, 1734.

[*Reported in* 3 *Peere Williams*, 334.[1]]

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THREE sisters and their husbands, claiming as residuary legatees under the will of Robert Style, brought their bill against his widow for divers goods of the testator detained by her, which were not given her by the said will; and the widow preferred her bill for goods detained by the executors, and which (as was alleged) she was entitled to by the will.[2]

Another thing insisted upon on behalf of the defendant, the widow, was that the testator allowed his first wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from the said farm (over and besides what was used in the family), for her own separate use, calling it her "pin-money"; and upon the death of the first wife, and until the testator married the defendant, Style, the testator's sister, the defendant, Pelling, kept his house, and had the same allowance, which was also continued to the defendant, the widow, after her marriage, by way of "pin-money"; and it was proved in the cause that her husband, whenever any person came to buy any fowls, pigs, &c., would say he had nothing to do with those things, which were his wife's; and that he also confessed, that, having been making a purchase of about £1,000 value, and wanting some money, he had been obliged to borrow about £100 of his wife to make up the purchase money; therefore now the widow claimed to be paid this £100.

To which it was answered, that here was no deed touching this agreement, nor any writing whatsoever, whereby to raise a separate property in a *feme covert*, which was what the law did not favor; that it was no more than a connivance, or permission, that the wife should take these things and continue to enjoy them during his (the husband's) pleasure, which pleasure was determined by his death; besides, this agreement, being after marriage, was but a voluntary one, for which a court of equity usually leaves the party to take his remedy at law; and that, in truth, the husband's borrowing this £100 of his wife was no more than borrowing his own money.

But the Lord Chancellor decreed that the widow, the defendant, was well entitled to come in for this £100 as a creditor before the Master, observing that the courts of equity have taken notice of and allowed *feme coverts* to have separate interests by their husbands' agreement; and this £100 being the wife's savings, and here being evidence that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality, and such agreement would be of little avail were it to determine by the husband's death; that it was the strongest proof of the husband's consent, that the wife should have a separate property in the money arising by these savings, in that he had applied to her and prevailed with her to lend him this sum; in which case he did not lay claim to it as his own, but submitted to borrow it as her money.

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[1] 2 Eq. Ab. 156, s. c. — ED.

[2] A portion of the case, not relating to the law of trusts, has been omitted. — ED.

Wherefore, and especially as here was no creditor of the husband to contend with, it was ordered that the wife should be allowed to come in for this £100 as a creditor before the Master; and the court cited the case of Calmady *v.* Calmady, where there was the like agreement made betwixt the husband and wife, that upon every renewal of a lease by the husband two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money.[1]

BEARD *v.* BEARD.

IN CHANCERY, BEFORE LORD HARDWICKE, C., APRIL 5, 1744.

[*Reported in* 3 *Atkyns*, 72.]

THE plaintiff's husband, a freeman of London, being at variance with his wife, in January, 1739, by his will, executed at a tavern, gives all his estate, real and personal, to his brother, and makes him his executor.

In November, 1740, by a deed poll, he gives and grants unto his wife all his substance which he now has or may hereafter have.

The bill was brought by the wife, who insists upon the deed poll, and that the will was revoked by this subsequent act of the husband in his lifetime.

The counsel for the plaintiff cited Boughton *v.* Boughton, the 5th of December, 1739,[2] and Harvey *v.* Harvey, November the 12th, 1739.[3]

LORD CHANCELLOR. A man here has done two very unreasonable acts; if it should happen one trips up the heels of the other, it is a very fortunate thing to set everything right again.

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[1] Ward *v.* Bowyer, Finch, 56; Herbert *v.* Herbert, Prec. Ch. 44; Bains *v.* Ballat, 2 Eq. Abr. 156; Manzey *v.* Hungerford, 2 Eq. Abr. (3d ed.) 155; Carter *v.* Worthington, 82 Ala. 335, Bangs *v.* Edwards, 88 Ala. 382, Oglesby *v.* Hall, 30 Ga. 386; Kee *v* Vasser, 2 Ired. Eq. 553; Wood *v.* Warden, 20 Ohio, 518; Pinney *v.* Fellows, 15 Vt. 525 (*semble*); Stimson *v.* White, 20 Wis. 562 (*semble*) *Accord.*

Lady Tyrrel's Case, Freem. 304 *Contra.*

Conf. Ashworth *v.* Outram, 5 Ch. Div. 923; Lovell *v.* Newton, 4 C. P. D. 7, *Re* Dearmer (Ch. D.), 53 L. T. Rep. 905, which cases were decided under the Married Women's Property Act, 33 & 34 Vict. c. 93. — ED.

[2] 1 T. Atk. 625.

[3] *Vide* 1 T. Atk. 561.

A wife appears here to be unprovided for, both before and after marriage.

A will is made at a tavern, probably in a passion, for the husband was parted from his wife at that time, by which he gives his whole estate to his brother.

Afterwards he is guilty of another unreasonable act, — a gift to his wife, by deed poll, of all his substance.

The question is, Which is to take effect ?

The latter cannot take effect as a grant or deed of gift to the wife, because the law will not permit a man to make a grant or conveyance to the wife in his lifetime, neither will this court suffer the wife to have the whole of the husband's estate while he is living, for it is not in the nature of a provision, which is all the wife is entitled to.[1]

He declared, likewise, that the will was revoked[2] as to all the personal estate by the deed poll, and yet it cannot take effect as a gift or grant of such personal estate to the plaintiff, but the said personal estate must be distributed.

PRICE v. PRICE.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., NOVEMBER 25, DECEMBER 2, 1851.

[*Reported in* 14 *Beavan*, 598.]

ON the 8th of July, 1849, George Price, the late husband of the plaintiff, being seised in fee simple of the messuage in question, and in which he and his wife resided, executed a deed poll in these words: "July 8th, 1849. I hereby certify that I, George Price, collier, of Whitecroft, in the township of West Dean and county of Gloucester, for and in consideration of the good will which I bear towards my wife, Esther Price, also of the same place, have given and granted, and do hereby freely give and grant, to the said Esther Price, in the presence of my uncle, Samuel Price, of the same place, all my land, house, and chattels. And I hereby again declare that I, George Price, have absolutely and of my own accord given and granted the same, without any manner of condition, to the aforesaid Esther Price, and it is her sole and absolute property henceforth and forever. In witness whereof, I have, this 8th day of July, in the year of our Lord 1849, set my hand and seal."

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[1] Warlick *v.* White, 86 N. Ca. 139; Coakes *v.* Gerlach, 44 Pa. 43 *Accord.*

But a husband's gift of his entire property to his wife was upheld in Dale *v.* Lincoln, 62 Ill. 22; Wilder *v.* Brooks, 10 Minn. 50; Thompson *v.* Allen, 103 Pa. 44; Jones *v.* Obenchain, 10 Grat. 259. See also Seals *v.* Robinson, 75 Ala. 363. — ED.

[2] So much of the opinion as relates to the question of revocation is omitted. — ED.

The deed was executed by George Price, and witnessed by William Tanner Sydney and Samuel Price.

Upon the execution of the deed, the grantor delivered it into the custody of one of the witnesses attesting the execution.

On the 20th of August, 1850, George Price died intestate, nothing further having taken place.

Esther Price having continued in possession, Emma Price, the heiress at law of George Price, commenced an action of ejectment against her, and obtained a verdict.

Esther Price filed the present bill against Emma Price, the heiress at law of George Price, praying to have it declared that the defendant was a trustee of the legal estate in the messuage, for the benefit of the plaintiff; for consequential relief, and for an injunction to restrain execution in the action of ejectment brought by Emma Price, to recover possession of the property, in which the verdict had been obtained.

The common injunction had been obtained for want of answer; and, the answer having been put in, the plaintiff now showed cause against dissolving the injunction, upon the merits confessed by the answer.

Mr. Eddis, for the plaintiff.

Mr. Sandys, for the defendant.[1]

The Master of the Rolls. I will consider this case.

The Master of the Rolls. It is not disputed that the deed in question was wholly inoperative at law; but the plaintiff contends that this deed created the husband a trustee for the separate use of his wife, and that the heiress at law of the intestate became, on his death and in like manner, a trustee for the plaintiff.

Upon the statement of this case by the counsel for the plaintiff I entertained a strong opinion that the deed did not create any trust which this court could enforce; but, as no cases were then called to my attention, I reserved my judgment, in the apprehension that I might, by acting upon my first impression, do injustice to the plaintiff, and in order that I might be able to examine the later authorities on this subject. This examination has confirmed me in the view I originally entertained, that this deed created no trust that this court can enforce.

In this case, it is first to be considered whether the deed would have created a trust enforceable in this court as between strangers; and, if it would not, whether the circumstance that the transaction is one between husband and wife produces any such relation.

As between strangers, I am of opinion that this deed would have been merely inoperative in equity as well as at law. The rule of courts of equity with regard to gifts *inter vivos* is, that they will be enforced only when the gift is completed, and when nothing remains to perfect the title of the donee. The cases of trust, however, are not exactly the same; for if the owner of an estate in fee simple, having the legal estate, or one who has stock standing in his name, execute a deed declaring himself to be a trustee of the estate or of the stock for the benefit of another, and he delivers that instrument to the *cestui que trust*, and acts upon it, although no conveyance of the legal estate and no transfer of the stock should take place, (though I do not know a case precisely in point,[1]) still that would probably be sufficient to create a trust, and the observations of Lord Eldon in *Ex parte* Pye and Dubost support that doctrine. That case, however, is one of great peculiarity.

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[1] The arguments of counsel are omitted. — Ed.

But, on the other hand, if the transaction purports to be a gift, and not a declaration of trust, this court will not convert an imperfect gift into a trust. The case of Edwards *v.* Jones is distinct on this point. The obligee of the bond, in that case, made an indorsement on it in terms very similar to the present deed. It was to this effect: "I, Mary Custance, do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece, E. E., with full power and authority for the said E. E. to sue for and recover the amount thereof, and all interest now due or hereafter to become due thereon." Both Sir L. Shadwell, originally, and Lord Cottenham, on appeal, held this to be an imperfect gift and not a trust, and that the relation of trustee and *cestui que trust* was not created. This case was commented upon with approbation, and followed by Vice Chancellor Wigram and Lord Lyndhurst, in Meek *v.* Kettlewell,[2] and I have no doubt but that it correctly states the law relating to these instruments.

What is the case here? The instrument does not profess to be a declaration of trust, but to be a distinct gift. The giver treats it as such, and parts with the deed, which, if he had meant to constitute himself the trustee, he should not have done. It is, in truth, not a declaration of trust, but either a gift of the whole property or nothing. As a gift it is clearly inoperative; no estate passed, and, in truth, nothing took place, but the execution of the deed, the communication of it to the wife, and the delivery of it to the attesting witness. If I were to decide that this deed would be good as between strangers, I should really be deciding that, if a man execute a deed, simply saying, "I hereby give all my estate at A. to another," and nothing further takes place, either to give possession or to transfer the legal estate, this court would compel delivery of the estate. This would, in my opinion, be contrary to the authorities, and I entertain no doubt but that, in such a case, equity would leave the parties to their legal rights, whatever they might be, and would not, in any respect, interfere to assist either party. The observations of Sir J. Wigram are admirably accurate and distinct on this head.

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[1] The learned judge seems to have overlooked Wheatley *v.* Purr (1837), 1 Keen, 551, and Thorpe *v.* Owen (1842), 5 Beav. 224. As late as 1855, however, Lord Cranworth, C. said, in Scales *v.* Maude, 6 D. M. & G. 43, 51: "A mere declaration of trust by the owner of property in favor of a volunteer is inoperative, and this court will not interfere in such a case. The case is different where there has been a change of legal ownership, and so a trust has been constituted, and then the court will inquire what the trusts are. But there is no authority in favor of the defendant's contention." His Lordship corrected this *dictum* in Jones *v.* Locke, 1 Ch. Ap. 23, 28, remarking: "And there is no doubt also that, by some decisions, unfortunate I must think them, a parol declaration of trust of personalty may be perfectly valid even when voluntary." — ED.

[2] 1 Hare, 464.

The next question is this: This was a transaction between husband and wife; the deed was executed for the benefit of the wife; it is expressed to be for her sole use. Did this circumstance give to the transaction a different character from that which it would have had if it had been one between strangers? Was there a good trust created as soon as the deed was executed? In other words, could the wife, during the life of the husband, have maintained a bill in this court, by her next friend, against the husband, to have it declared that he was a trustee of this property, and to have the trusts applied for her separate use? I am of opinion that no such bill could have been supported. It is true that Lord Thurlow, in Colman *v.* Sarrel, says: "Whenever you come into equity to raise an interest by way of trust, there must be a valuable consideration, or, at least, what a court of equity calls a meritorious consideration, such as payment of debts, or making a provision for a wife or child." This, if taken literally, is, I think, inaccurately stated, because, if the relation of trustee and *cestui que trust* be clearly established, the court will act upon it, although there was no consideration at all; but if it be meant by this passage that instruments importing a gift are considered in a different point of view when there is a meritorious consideration than where there is none at all, or, in other words, that a voluntary gift by a man to his creditors, or to his wife or child, is to be regarded on different principles from one to a stranger, I am unable to discover on what principle such a proposition can properly rest; nor can I find it supported by any of the decided cases.

On the contrary, the opposite is expressly decided in the case of Jeffreys *v.* Jeffreys.[1] In that case, a father, by a voluntary settlement, conveyed certain lands to trustees, in trust to pay him an annuity for his life, and, after his death, to sell and divide the proceeds amongst his daughters; and, by the same deed, he covenanted to surrender certain copyholds to the uses of the settlement, but which he omitted to do. The court executed the trust of the freeholds, that being complete, but dismissed the bill with costs, so far as related to the copyholds.

Upon the whole, therefore, I am of opinion that the relation of trustee and *cestui que trust* was not created in this case; that the transaction was an imperfect gift, in regard to which equity will not interfere to assist either side, but will leave the parties as it finds them, and that, consequently, this injunction must be dissolved.[1]

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[1] Cr. & P. 138.

BADDELEY *v.* BADDELEY.

In the High Court of Justice, before Sir Richard Malins, V. C., July 24, 1878.

[*Reported in* 9 *Chancery Division*, 113.]

On the 30th of April, 1872, John Baddeley executed a deed poll, of which the material part was as follows: "Whereas I am beneficially possessed of the ground rents hereby intended to be settled, now in consideration of my love and affection for my wife I do hereby settle, assign, transfer, and set over unto my said wife Eliza Baddeley as though she were a single woman, her executors, administrators, and assigns, all that my share in [certain specified houses and ground rents in Middlesex] as though she were now a *feme sole* and unmarried, and in accordance with the spirit and intention of the recent act of Parliament entitled the Married Women's Property Act, 1870."

This deed was duly registered in the Middlesex Registry, and Mrs. Baddeley entered into the receipt of the rents.

Mrs. Baddeley claimed a declaration that the deed poll operated as a valid assignment, and a demurrer to the claim was put in on behalf of Mr. Baddeley's legal personal representatives.

J. Pearson, Q. C., and *Gregory*, for the legal personal representatives.

Glasse, Q. C., and *Methold*, for the widow.[2]

Malins, V. C. No one can doubt that the husband's intention here was to give his wife the leasehold property; but it is contended that the deed was intended to be an assignment, and is therefore inoperative as between husband and wife. No doubt a voluntary gift by way of assignment is invalid, unless it is perfected by a transfer; the voluntary settlor must do all that he can do to transfer the property, and a husband cannot transfer to his wife. But this is, in my opinion, a case where the husband has declared himself a trustee for his wife, and she entered into possession, — an act which I construe, not as an attempt to take possession adversely to her husband, which could not be done, as is shown by Roe *v.* Wilkins,[3] but as a taking possession of her separate property under the trust. The husband was no doubt mistaken in thinking he could make this gift by way of assignment; but there is enough in the deed to make it operate as a declaration of trust which the court ought to carry into effect. The law on this subject is correctly stated in Grant *v.* Grant,[1] and I am not disposed to disagree with Richardson *v.* Richardson and Morgan *v.* Malleson, notwithstanding the remarks of Sir G. Jessel in Richards *v.* Delbridge. I therefore declare that there is a trust properly constituted in favor of Mrs. Baddeley.[2]

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[1] In Woodford *v.* Charnley, 28 Beav. 96, where one who held the legal estate in a certain freehold to secure the payment of £5,000, for which payment, however, no one was personally liable, assigned, by a voluntary deed, his interest in the said £5,000, to trustees upon certain trusts therein declared, Sir John Romilly, M. R., decided that the deed was wholly inoperative. See Lane *v.* Ewing, 31 Mo. 75. — Ed.

[2] The arguments of counsel are omitted. — Ed.

[3] 4 A. & E. 86.

IN RE BRETON'S ESTATE. BRETON *v.* WOOLLVEN.

IN CHANCERY, BEFORE SIR CHARLES HALL, V. C., APRIL 2, 1881.

[*Reported in Law Reports*, 17 *Chancery Division*, 416.]

FREDERICK BRETON, who died on the 7th of June, 1880, by his will, dated the 8th of August, 1878, appointed two executors and trustees, and after bequeathing certain pecuniary legacies, and making a specific bequest to the widow of a late brother, and specifically devising certain freehold property, bequeathed all the residue of his property and effects to his trustees upon trust at their discretion to continue them or to make other investments of the moneys which were vested in them, and to permit his wife to receive the income of his residuary estate and the investments during her life, and after her death, as to the same residuary estate and the income, upon trust for his six nieces in equal shares.

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[1] 34 Beav. 623.

[2] Fox *v.* Hawks, 13 Ch. D. 822; Jones *v.* Clifton, 101 U. S. 225; Moore *v.* Page, 111 U. S. 117; McMillan *v.* Peacock, 57 Ala. 127; Helmetag *v.* Frank, 61 Ala. 67; Barker *v.* Koneman, 13 Cal. 9 (*semble*); Dale *v.* Lincoln, 62 Ill. 22; Majors *v.* Everton, 89 Ill. 56; Sanford *v.* Finkle, 112 Ill. 146; Sims *v.* Rickets, 35 Ind. 181; Brookbank *v.* Kennard, 41 Ind. 339; Wilder *v.* Brooks, 10 Minn. 50; Wells *v.* Wells, 35 Miss. 638; Shepard *v.* Shepard, 7 Johns. Ch. 57; Hunt *v.* Johnson, 44 N. Y. 27; Mason *v.* Libbey, 19 Hun, 119 (see Johnson *v.* Rogers, 35 Hun, 267); Miller *v.* Miller, 17 Oreg. 423; Garner *v.* Garner, Busbee, Eq. 1; Crooks *v.* Crooks, 34 Ohio St. 610; Penn. Co. *v.* Neel, 54 Pa. 9; Story *v.* Marshall, 24 Texas, 305; Jones *v.* Obenchain, 10 Grat. 259; Sayers *v.* Wall, 26 Grat. 354; McKenzie *v.* Ohio Co., 27 W. Va. 306; Humphrey *v.* Spencer (W. Va. 1892), 14 S. E. R. 410; Putnam *v.* Bicknell, 18 Wis. 333; Hannan *v.* Oxley, 23 Wis. 519; Wheeler Co. *v.* Monahan, 63 Wis. 198; Kinney *v.* Dexter (Wis. 1892), 51 N. W. R. 82 *Accord.*

Fowler *v.* Trebein, 16 Ohio St. 493, 497 *Contra.* But see Crooks *v.* Crooks, 34 Ohio St. 610, 615.

In Adams *v.* Adams, 21 Wall. 185, where a husband signed, and had recorded, a deed of conveyance of real estate to A., in trust for his wife, but the deed failed to transfer the legal estate because of the refusal of A. to become a party to the conveyance, it was held that an irrevocable trust had nevertheless been created for the wife.

A gratuitous conveyance by a wife to her husband is ineffectual, both at law and in equity. Kinnaman *v.* Pyle, 44 Ind. 275; White *v.* Wager, 25 N. Y. 328; Winans *v.* Peebles, 32 N. Y. 423; Blaesi *v.* Blaesi, 14 N. Y. Civ. Pr. 216. (See Hunt *v.* Johnson, 44 N. Y. 27, 35–37; Townshend *v.* Townshend, 1 Abb. N. C. 81.) But see Porter *v.* Wakefield, 146 Mass 25, 27. — ED.

The testator had no real estate not specifically devised, but his personal estate not specifically bequeathed was of the value of about £22,000.

The testator intermarried with the plaintiff in January, 1868. At that time she was possessed of certain articles of jewelry of her own, and on the occasion of the marriage, and subsequently, her husband gave her many other articles of jewelry; and all these articles she always retained and had sole possession and used and wore as she pleased.

The testator having previously purchased some furniture, on the 22d of April, 1868, wrote and handed to his wife the following paper: —

"This is to certify that there being now at Messrs. Maple & Co., 145 Tottenham Court Road, one hundred pounds worth of furniture belonging to me, I give the same to my dear wife Agnes A. Breton, absolutely and unreservedly, for her own use and benefit.

"Haxell's Hotel, Strand, London,
April 22d, 1868.
FREDK. BRETON,
Major Rl. Wilts Militia."

The testator, having purchased some plate and plated articles, wrote to the plaintiff thus: —

"LONDON, June 1st, 1868.

"My dearest Wife, — I this day make you a present of the plate, &c., now at Mappin and Webb's, and which they are taking care of for me, for your sole use and benefit. The sum I paid for it is £59 7*s.* 10*d.*

"Ever yr affecte husband,
"FREDK. BRETON."

The testator and his wife subsequently hired a house at Forest Hill, where they went to reside, and thereupon the furniture, plate, and plated articles were removed thither. Other furniture and household goods purchased by or belonging to the testator were placed in the same house, and on the 18th of June, 1868, he wrote and handed the following to the plaintiff: —

"My dearest Wife, — Having previously made over to you for your sole use and benefit a certain amount of furniture, plate, &c., I now present you with everything, furniture, linen, &c., plate, china, and glass, and all jewelry now belonging to me at No. 1 Dulwich Villas, Devonshire Road, Forest Hill. All this to be yours and yours only from this date, June eighteenth, 1868. This gift from

"Yr ever affecte husband,
"FREDK. BRETON."

The testator and his wife subsequently went to reside in a house in the Belvedere Road, where they lived at the time of his death. To that house all the furniture, plate, and plated and other articles and goods were taken from the house at Forest Hill. While the testator and his wife resided together at the two houses, the articles mentioned were used in the ordinary way, and from time to time various additions were made thereto by the testator; but during his life he always, as alleged, spoke of all the furniture and other articles and goods, and the said additions thereto, as being the sole property of his wife, and often referred to the useful provision for her comfort which she would have therein and by means thereof after his death.

The trustees and executors having insisted that all the said jewelry, furniture, plate, and plated and other articles and goods, and the said additions thereto, formed part of the testator's estate, the widow brought this action to have it ascertained and declared whether the same, or any and which of them, or any and what parts thereof, belonged to her or formed part of the testator's estate; and if necessary an administration of the trusts by the Court.

At the hearing, the executors did not claim the articles of jewelry.

W. Pearson, Q. C., and *Renshaw*, for the plaintiff.[1]

Cozens-Hardy, for the defendants, the trustees, and

Hastings, Q. C., and *H. Greenwood*, for the defendant, the niece, were not called upon.

HALL, V. C. I am unable to support this gift to the plaintiff, the wife, as a trust declared by her husband in her favor. I am very sorry for it, because it is a monstrous state of the law which prevents effect being given to such a gift. I think that the difficulty in the case is occasioned by two or three of the decisions which have been referred to, and which seem to favor the contention that these paper writings can be supported as a declaration of trust by the husband in favor of his wife. It was submitted that the husband must be taken to have intended, knowing what the law is, to constitute himself a trustee for her, that being the only way of giving effect to the paper writings, i. e., as other trustees were not appointed, he must be held to have constituted himself a trustee. That argument appears to me to come to this, that in every case of an imperfect gift on the part of the alleged donor, if the gift be not effectual by reason of an incomplete transfer of the property from the alleged donor to the intended donee, or to some person who is to be a trustee for the intended donee, the Court must give effect to the donation by holding that the alleged donor was a trustee, as it must be considered that he knew the law, and that if he did not effectuate his object in the one way in which it would have been valid, it must be done in another. But in truth, in the one case as well as in the other, whether a wife or a stranger be the object of the gift, it is manifest from the transaction taken by itself that the alleged donor was mistaken as regards the proper and legal mode of effectuating that which he intended to do. It is plain that the husband was mistaken, and it is not necessary to impute to him that he meant to make the gift in an ineffectual way. Looking at the documents, they are a contradiction of any intention on his part to do that.

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[1] The argument for the plaintiff is omitted. — ED.

The case of Grant *v.* Grant[1] was that of a gift to a wife, and if the late Master of the Rolls had based his judgment on that ground, supporting it as being a special and peculiar case, and creating a different law as applicable to husband and wife in every case, I should have nothing more to do than to follow that decision. But it is plain, from the reasons given for the decision, that it was meant to be applicable to every other case of the kind, and not merely to that of husband and wife. No other cases of a gift by a husband to his wife have been referred to excepting the two recent decisions of Vice Chancellor Malins in the case of Baddeley *v.* Baddeley, and of Vice Chancellor Bacon in the case of Fox *v.* Hawks.[2] As to the former case, I observe that Vice Chancellor Malins said that the law was correctly stated in the case of Grant *v.* Grant, and that he was not disposed to disagree with the judgments in Richardson *v.* Richardson, and in Morgan *v.* Malleson, notwithstanding the remarks of the Master of the Rolls in the case of Richards *v.* Delbridge. That being so, there is, as Vice Chancellor Malins seems to have meant there should be, a clear difference of opinion between himself and the Master of the Rolls upon this question, because he adopted the decisions in the two cases of Richardson *v.* Richardson and Morgan *v.* Malleson, — decisions which the Master of the Rolls would not follow. That being so, I must look at all the authorities and endeavor to find a correct statement of the law on the subject. I consider that the principal authority in these cases is that of the case of Milroy *v.* Lord, where there is a very clear and elaborate statement of the law by the late Lord Justice Turner. A portion of the judgment of the Lord Justice was quoted by the Master of the Rolls in Richards *v.* Delbridge, and there is much in it which is, I think, applicable to this case. The Lord Justice, after stating that under the circumstances of the case before him it would be difficult not to feel a strong disposition to give effect to the settlement to the fullest extent, said, "But in order to render the settlement binding, one or other of these modes" — i. e. transfer of the property or declaration of trust — "must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift." What I am asked to do in this case is to read that sentence as having introduced into it the words, "except as to a gift from husband to wife." The Lord Justice Turner also said, "The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes." To give effect to this gift I must introduce the words, "except in the case of a wife." The Lord Justice proceeded to say, "If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust"; and he added that it must be plainly shown that it was the purpose of the settlement, or the intention of the settlor, to constitute himself a trustee. It is clear in this case that it was not so intended. It was not the purpose or meaning of the husband in writing these letters to constitute himself a trustee for his wife. I can well understand in such a case a husband saying to his wife, "I mean to give you this as your own, but when you ask me to be a trustee for you I must respectfully decline. I do not want to be involved in a trust of that kind or in any trust." Therefore it appears to me that, notwithstanding the decisions of Vice Chancellor Malins and Vice Chancellor Bacon in the two cases which have been observed upon, — and here I may just state that the case before Vice Chancellor Bacon of Fox *v.* Hawks had many special circumstances in it which are not unlikely to have influenced his mind in arriving at the conclusion to which he came, — I must hold that the furniture, plate, and other particulars, excepting the jewelry, do not belong to the plaintiff, but form part of the late husband's estate.[1]

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[1] 34 Beav. 623.

[2] 13 Ch. D. 822.

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[1] Gore *v.* Knight, 2 Vern. 535, n. 2; Moore *v.* Moore, 18 Eq. 474; Howes *v.* Prudential Co., 49 L. T. Rep. 33; *Re* Whitaker, 21 Ch. D. 657; Hayes *v.* Alliance Co., L. R. 8 Ir. 149; Dilts *v.* Stevenson, 17 N. J. Eq. 406; Wade *v.* Fisher, 9 Rich. Eq. 362 (*semble*) *Accord.*

Cowper's Case, 3 Atk. 39, 46 (cited); Grant *v.* Grant, 34 Beav. 623, Wallingsford *v.* Allen, 10 Pet. 583, 594 (*semble*); Williams *v.* Maull, 20 Ala. 721; McIlwain *v.* Vaughan, 76 Ala. 489; Rabitte *v.* Orr, 83 Ala. 185; Eddins *v.* Buck, 23 Ark. 507; Deming *v.* Williams, 26 Conn. 226; Jennings *v.* Davis, 31 Conn. 134 (*semble*); Underhill *v.* Morgan, 33 Conn. 105; Wheeler *v.* Wheeler, 43 Conn. 503, Long *v.* White, 5 J. J. Marsh. 226, 229 (*semble*); Thomas *v.* Harkness, 13 Bush, 23; Adams *v.* Brackett, 5 Met. 280, 285 (*semble*); Whitten *v.* Whitten, 3 Cush. 191, 199 (*semble*); (but see Spelman *v.* Albrich, 126 Mass. 113,) Ratcliffe *v.* Dougherty, 24 Miss. 181; Wells *v.* Treadwell, 28 Miss. 717; Walker *v.* Walker, 25 Mo. 367; Welch *v.* Welch, 63 Mo. 57; McCoy *v.* Hyatt, 80 Mo. 130; Clark *v.* Clark, 86 Mo. 114; Botts *v.* Gooch, 97 Mo. 88; Skillman *v.* Skillman, 2 Beasley, 403 (*semble*); Neufville *v.* Thomson, 3 Edw. Ch. 92 (*semble*); Babcock *v.* Ehler, 24 N. Y. 623; Kelley *v.* Campbell, 1 Keyes, 29; Savage *v.* O'Neill, 44 N. Y. 298; Rawson *v.* Pa. Co., 48 N. Y. 212, 216; Reed *v.* Reed, 52 N. Y. 651; Shuttleworth *v* Winter, 55 N. Y. 624 (*semble*); Seymour *v.* Fellows, 77 N. Y. 170, Paschall *v.* Hall, 5 Jones, Eq. (N. Ca.) 108 (*semble*); (see Warlick *v.* White, 86 N. Ca. 139); Huber *v.* Huber, 10 Oh. 371; Sessions *v.* Trevitt, 39 Oh. St. 259; McKennan *v.* Phillips, 6 Whart. 571, Herr's Appeal, 5 Watts & S. 494; Lee *v.* Newell, 107 Pa. 283; Elms *v.* Hughes, 3 Desaus. 155; Powell *v.* Powell, 9 Hum. 477, 482; Sheegog *v.* Perkins, 4 Baxt. 273; McCampbell *v.* McCampbell, 2 Lea, 661, Templeton *v.* Brown, 86 Tenn. 50; Bradshaw *v.* Mayfield, 18 Tex. 21 (*semble*); Cardell *v.* Ryder, 35 Vt. 47; Fisher *v.* Williams, 56 Vt. 586; Fox *v.* Jones, 1 W. Va. 205 *Contra.*

Compare McLean *v.* Longlands, 5 Ves 71; Walter *v.* Hodge, 2 Swanst. 92; *Ex parte* Whitehead, 14 Q. B. Div. 419; Trowbridge *v.* Holden, 58 Me. 117; Lane *v.* Lane, 76 Me. 521; Woodford *v.* Stephens, 51 Mo. 443, Keniston *v.* Keniston, 56 Vt. 680.

In Massachusetts a husband's gift of personalty to his wife is revocable by him, but not by his executor. Marshall *v.* Jaquith, 134 Mass. 138. See also Manny *v.* Rixford, 44 Ill. 129. — Ed.

SECTION VIII.

The Statute of Frauds.

STATUTE 29 CHARLES II., CHAPTER 3, SECTIONS 7, 8, AND 9.

1676.

[8 *Statutes at Large*, 406.]

VII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding.

IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be wholly void and of none effect.[1]

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[1] AMERICAN STATUTES. — The seventh section of the English Statute of Frauds has been adopted with substantially the same phraseology in
Arkansas. — Ark. Dig. (1884), § 3382.
Florida. — Fla. Dig. (1881), c. 32, § 2.
Illinois. — Ill. Rev. St. (1887), p. 742, § 9.
Maryland. — Alex. Br. St. (1870), p. 546.
Missouri. — Mo. Rev. St. (1879), § 2511.
New Jersey. — N. J. Rev. St. (1877), p. 445, § 3.
Pennsylvania. — 1 Br. & Purd. Dig. (1883), p. 831, § 3.
South Carolina. — S. Ca. Gen. St. (1882), § 1961. R.I. — st 1749.

In the following States trusts of land must be "created or declared" in writing:
California. — Cal. Civ. Code (1885), § 852.
Dakota. — Dak. Comp. L. (1887), § 2795.
Georgia. — Ga. Code (1882), § 2310.
Maine. — Me. Rev. St. (1883), c. 73, § 11.
Massachusetts. — Mass. Pub. St. (1882), c. 141, § 1.
New Hampshire. — N. H. Gen. L. (1878), c. 135, § 13.
Vermont. — Vt. Rev. L. (1880), § 1933.

In others such trusts must be "created or declared by deed or conveyance in writing," e. g.:
Colorado. — Colo. Gen. St. (1883), § 1515.

Michigan. — 2 How. An. St. (1882), § 6179.
Minnesota. — Minn. St. (1878), c. 41, § 10.
Montana. — Mont. Comp. St. (1887), § 217, p. 651.
Nebraska. — Neb. Comp. St. (1881), c. 32, § 3.
Nevada. — Nev. Gen. St. (1885), § 2624.
New York. — 4 N. Y. Rev. St. (1889), 2589.
Oregon. — Hill's An. Laws (1887), 593, 594.

Or by "deed or instrument in writing":

Idaho. — Id. Rev. St. (1887), § 6007.
Utah. — Ut. Comp. L. (1888), § 3916.
Wisconsin. — Sanborn and Berryman, Annot. St. (1889), § 2302.

In two States the statute provides that trusts shall be "created" in writing, viz.:

Alabama. — Ala. Code (1886), § 1845.
Indiana. — Ind. Rev. St. (1881), § 2969.

In Maine, at one time, trusts must be "created *and* declared." Me. Rev. St. (1841), c. 91, § 31.

In two others "declarations or creations of trusts . . . must be executed in the same manner as deeds of conveyance," viz.:

Iowa. — McClain's An. Code (1888), § 3185.
Kansas. — Kas. Comp. L. (1885), § 1092. See also § 6042, 1.

In one State trusts must be "made and manifested by writing," and the writing must be "acknowledged and proved as other writings," must be recorded, and takes effect only from the time it is lodged for record, viz.:

Mississippi. — Rev. Code Miss. (1880), § 1296.

In the following States and Territories there is no statute making a writing essential to the validity of a trust:

Arizona.
Connecticut.
Delaware.
Kentucky.
New Mexico.
North Carolina.
Ohio.
Rhode Island.
Tennessee.
Texas.
Virginia.
West Virginia.
Wyoming.

In these States, therefore, there would seem to be no objection to oral trusts of land. This view has been adopted in most of them. Hall *v.* Livingston, 3 Del. Ch. 348; Pierson *v.* Pierson, 5 Del. Ch. 11; Miller *v.* Stokely, 5 Oh. St. 197; Mathews *v.* Leaman, 24 Oh. St. 615; Harvey *v.* Gardner, 41 Oh. St. 642; Haywood *v.* Ensley, 8 Humph. 460; James *v.* Fulcrod, 5 Tex. 512; Mead *v.* Randolph, 8 Tex. 191, 198; Fretelliere *v.* Hindes, 57 Tex. 392; U. S. Bank *v.* Carrington, 7 Leigh, 576 (*semble*); Walraven *v.* Locke, 2 Pat. & H. 547, 552 (*semble*). (But see Sprinkle *v.* Heyworth, 26 Grat. 384, 392; Borst *v.* Nalle, 28 Grat. 423, 436.) A similar view prevailed in Mississippi and Pennsylvania before there was any statutory requisite of writing in the case of trusts. Soggins *v.* Heard, 31 Miss. 426, 429; Hubert *v.* Murphy, 7 Barr, 420; Freeman *v.* Freeman, 2 Pars. Eq. 81; Lingenfelter *v.* Ritchey, 58 Pa. 485 (explaining Porter *v.* Mayfield, 21 Pa. 263); Meason *v.* Kaine, 63 Pa. 335, 339.

In Connecticut and Kentucky, however, the courts have held, but upon reasoning that will not bear examination, that a writing is essential to the validity of a trust of land although not required by any statute. Dean *v.* Dean, 6 Conn. 285; Church *v.* Sterling, 16 Conn. 388, 401; Vail's Ap., 37 Conn. 185, 198; Todd *v.* Munson, 53 Conn. 579; Chiles *v.* Woolson, 2 Bibb, 71; Parker *v.* Bodley, 4 Bibb, 102; Graves *v.* Dugan, 6 Dana, 331, 332; Aynesworth *v.* Haldeman, 2 Duv. 565, 569–570.

In North Carolina a trust created after the analogy of a feoffment to uses is valid though oral. Shelton *v.* Shelton, 5 Jones, Eq. 292; Riggs *v.* Swan, 6 Jones, Eq. 118; Leggett *v.* Leggett, 88 N. Ca. 108. But a trust following the analogy of a bargain and sale, or covenant to stand seised, can arise only by deed. Frey *v.* Ramsour, 66 N. Ca. 466; Pittman *v.* Pittman, 107 N. Ca. 159.

In West Virginia a unique distinction is taken. An oral trust is valid if in favor of a third person, but invalid if in favor of the grantor. Hardman *v.* Orr, 5 W. Va.

71; Nease *v.* Capehart, 8 W. Va. 95, 109; Troll *v.* Carter, 15 W. Va. 567, 578; Zane *v.* Fink, 18 W. Va. 693, 755; Pusey *v.* Gardner, 21 W. Va. 469; Cain *v.* Cox, 23 W. Va. 594; Titchenell *v.* Jackson, 26 W. Va. 460.

WHAT IS A SUFFICIENT COMPLIANCE WITH THE STATUTE. — In jurisdictions where by the terms of the statute a trust need not be created, but must be "manifested and proved" by a writing, a subsequent admission in writing by the party to be charged is as effectual as the expression of a trust in the instrument of its creation. And this admission, like any other, may be contained in almost any conceivable document, as a letter, pamphlet, petition, answer, deposition, receipt, contract, or the like. Smith *v.* Wilkinson, 3 Ves. Jr. 705, cited; Forster *v.* Hale, 3 Ves. Jr. 696, 707, 5 Ves. 308, 315; Randall *v.* Morgan, 12 Ves. 67, 73–74; Dale *v.* Hamilton, 2 Phill. 266, 275; Smith *v.* Matthews, 3 D. F. & J. 139, 151; Pant Mawr Co. *v.* Fleming (Court of Session, 1883), 10 R. 457; Robson *v.* Harwell, 6 Ga. 589, 604; McLaurie *v.* Partlow, 53 Ill. 340; Kingsbury *v.* Burnside, 58 Ill. 310; Phillips *v.* South Park Commissioners, 119 Ill. 626, 640; Aynesworth *v.* Haldeman, 2 Duv. 565, 569; Bragg *v.* Paulk, 42 Me. 502; Bates *v.* Hurd, 65 Me. 180; McClellan *v.* McClellan, 65 Me. 500; Maccubbin *v.* Cromwell, 7 Gill & J. 157; Albert *v.* Winn, 5 Md. 66, 73; Gordon *v.* McCulloh, 66 Md. 245; Barrell *v.* Joy, 16 Mass. 221; Safford *v.* Rantoul, 12 Pick. 232; Montague *v.* Hayes, 10 Gray, 609; Urann *v.* Coates, 109 Mass. 581; Cornelius *v.* Smith, 55 Mo 528; Packard *v.* Putnam, 57 N. H. 42; Hutchinson *v.* Tindal, 2 Green, Ch. 357; Smith *v.* Howell, 3 Stockt. 349; Brown *v.* Combs, 5 Dutch. 36; McVay *v.* McVay, 43 N. J. Eq. 47; Newkirk *v.* Place, 47 N. J. Eq. 477; Movan *v.* Hays, 1 Johns. Ch. 339, 342; Steere *v.* Steere, 5 Johns. Ch. 1, 12; Gomez *v.* Traders' Bank, 4 Sandf. 102; Cook *v.* Barr, 44 N. Y. 156; Rutledge *v.* Smith, 1 McC. Ch. 119; Reid *v.* Reid, 12 Rich. Eq. 213; Mathews *v.* Massey, 4 Baxt. 450; Pinney *v.* Fellows, 15 Vt. 525, 539; McCandless *v.* Warner, 26 W. Va. 754; Pratt *v.* Ayer, 3 Chand. 265.

Statutes requiring trusts to be "created or declared" in writing have received a similar interpretation. Jenkins *v.* Eldredge, 3 Story, 294 (*semble*); Bates *v.* Hurd, 65 Me. 180; McClellan *v.* McClellan, 65 Me. 500; Urann *v.* Coates, 109 Mass. 581. Even when the trust must be "created or declared by deed or conveyance in writing," the deed or conveyance may be subsequent to the creation of the oral trust. Sime *v.* Howard, 4 Nev. 473; Wright *v.* Douglass, 7 N. Y. 564 (see, however, Cook *v.* Barr, 44 N. Y. 156, 159); White *v.* Fitzgerald, 19 Wis. 480. Compare Loring *v.* Palmer, 118 U. S. 321, 339.

If the statute requires the trust to be "created" or "created *and* declared" in writing, a subsequent memorandum would seem to be insufficient. The court so decided in Richardson *v.* Woodbury, 43 Me. 206, 212, interpreting Me. Rev. St. (1841), c. 91, § 31, now repealed. But see, *contra*, Gaylord *v.* Lafayette, 115 Ind. 423, 428. The question was expressly left open in Patton *v.* Beecher, 62 Ala. 579, 587.

Inasmuch as a subsequent memorandum operates as an admission, the intention of the party making it is immaterial. Welford *v.* Beazely, 3 Atk. 503; Bates *v.* Hurd, 65 Me. 180; Hutchinson *v.* Tindal, 2 Green, Ch. 357, 362; Browne, St. Frauds (4th ed.), § 99. It is conceived, indeed, that the memorandum, if otherwise complete, would be a sufficient compliance with the statute, even though it contained an express repudiation by the trustee of his liability. See Langdell, Sales, Index, ¶ 72; Bailey *v.* Sweeting, 9 C. B. N. S. 843; Buxton *v.* Rust, L. R. 7 Ex. 279. There is, however, one exception to this proposition. A defendant who in his answer to a bill in equity admits an oral trust may nevertheless claim the benefit of the statute as a bar to the relief sought. Dean *v.* Dean, 1 Stockt. 425 (*semble*); Whiting *v.* Gould, 2 Wis. 552 (*semble*). If, on the other hand, the defendant does not rely on the Statute of Frauds in his answer, and the answer discloses the terms of the trust, the plaintiff will be entitled to a decree for the execution of the trust; McLaurie *v.* Parker, 53 Ill. 340; McCubbin *v.* Powell, 7 Gill & J. 157; the section of the statute relating to trusts differing from that relating to the sale of goods, the memorandum of which must exist before action brought. Langdell, Sales, Index, ¶ 72.

Antecedent Writing. — A writing antecedent to the creation of a trust cannot operate as an admission, which must, of course, relate to a contemporaneous or pre-existing fact. But such a writing may be an offer to act as trustee, which upon acceptance be-

GARDNER *v.* ROWE.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C., MAY 9, JUNE 19, JULY 5, 1825.

[*Reported in 2 Simon & Stuart*, 346.]

THE VICE CHANCELLOR.[1] On the 1st of January, 1812, the Earl of Mount Edgecumbe, by indenture of that date, granted to the bankrupt George Wilkinson the lease or set of a certain mine, called the Wheal Regent Mine, for a term of twenty-one years, for the considerations therein mentioned; and, by an indenture bearing date the 23d August, 1813, the bankrupt George Wilkinson, who, at the request of Rowe, had previously assigned five fourteenths to one Brodrick, after reciting that his name was used in the said indenture of the 1st January, 1812, as a trustee for Joshua Rowe, assigned and transferred the remaining fifty-nine parts or shares to the said J. Rowe, for the residue of the

1812
A took a
lease of a
mine for
years as
trustee f
B. A bec
insolvent
later, but
before he b
came so,
he had as
signed the
mine to
B. This i
[illegible]
[illegible] to
assignees
against
B. Held:
The indentu
of 1813, after
the declara
of trust
[illegible], is
[illegible]
or void
[illegible] in
favor of
B which
assignees

comes a written obligation so to act, and as such is a compliance with the statute. Bellamy *v.* Burrows, C. t. Talbot, 97; Morton *v.* Tewart, 2 Y. & C. Ch. 67. See also Jackson *v.* Moore, 6 Cow. 706, 726. It was intimated in Childers *v.* Childers, 1 DeG. & J. 482, that a letter written by a grantor antecedent to a deed of conveyance, and not referred to in the deed, might be a sufficient writing to satisfy the statute. But this opinion seems erroneous. The case itself was rightly decided on other grounds.

REQUISITES OF THE WRITING. — The writing must contain all the terms of the trust. Smith *v.* Matthews, 3 D., F. & J. 139; Loring *v.* Palmer, 118 U. S. 321; Gaylord *v.* Lafayette, 115 Ind. 423, 429; McClellan *v.* McClellan, 65 Me. 500, 506 (*semble*); Blodgett *v.* Hildreth, 103 Mass. 484, 486; York *v.* Perrine, 71 Mich. 567; Newkirk *v.* Place, 47 N. J. Eq. 477, 486; Steere *v.* Steere, 5 Johns. Ch. 1; Cook *v.* Barr, 44 N. Y. 156; Dillaye *v.* Greenough, 45 N. Y. 438 (*semble*); Dyer's Appeal, 107 Pa. 446; McCandless *v.* Warner, 26 W. Va. 754, 780.

But see, *contra*, the language of the court in Kingsbury *v.* Burnside, 58 Ill. 310; Fast *v.* McPherson, 98 Ill. 496. But the facts in each of these cases disclose a trust arising by operation of law.

The terms of the trust need not be contained in one document, but may be collected from several papers, if connected either physically or by reference of one to another, or if on their face referring to the same transaction. Kronheim *v.* Johnson, 7 Ch. D. 60; Loring *v.* Palmer, 118 U. S. 321; Tenney *v.* Simpson, 37 Kas. 579. Indeed, by some modern cases the connection between separate papers may be shown by parol evidence. Oliver *v.* Hunting, 44 Ch. D. 205.

Signature or Subscription. — The writing must be signed; it need not be subscribed. Morison *v.* Turnour, 18 Ves. 175 (*semble*); Kronheim *v.* Johnson, 7 Ch. D. 60, 67; Smith *v.* Howell, 3 Stockt. 349; Newkirk *v.* Place, 47 N. J. Eq. 477, 486. Except in jurisdictions where the statute in terms requires the writing to be subscribed, as in California, Civ. Code (1885), § 852; Colorado, Gen. St. (1883), § 1515; Dakota, Comp. L. (1887), § 2795; Idaho, Rev. St. (1887), § 6007; Michigan, 2 How. An. St. (1882), § 6179; Minnesota, St. (1878), c. 41, tit. 2, f. 10; Montana, Comp. St. (1887), § 217, p. 651; Nebraska, C. S. (1887), c. 32, § 3; Nevada, Gen. St. (1885), § 2624; New York, 4 N. Y. Rev. St. (1889), 2589; Oregon, Hill's An. Laws (1887), 593, 594; Utah, Comp. L. (1888), § 3916; Wisconsin, S. & B. An. St. (1889), § 2302. — ED.

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[1] See *supra*, p. 70, n. 1. — ED.

Can't disturb.

said term. It is admitted that, prior to this assignment, an act of bankruptcy had been committed by the said George Wilkinson, and that a commission of bankrupt was duly issued against him in the month of November, 1813; and the present bill is filed by the assignees of Wilkinson under that commission against J. Rowe and certain other persons claiming interest under him in the Wheal Regent Mine, for the purpose of having it declared that the lease of the Wheal Regent Mine is the property of the bankrupt. On the hearing of this cause the plaintiffs contended that it was established, by the evidence in the cause, that, at the time of the grant from Lord Mount Edgecumbe, it was the purpose of the bankrupt and J. Rowe that the bankrupt should hold the lease for his own benefit, and not as a trustee for J. Rowe; and the plaintiffs further contended, as a point of law, that if in fact it had been the purpose of the bankrupt and J. Rowe, at the time of the grant from Lord Mount Edgecumbe, that the name of the bankrupt should be used as a trustee for J. Rowe, yet that such trust could not prevail, because there was no written declaration of trust within the Statute of Frauds other than the indenture of 24th August, 1813, which, being executed by the bankrupt after his bankruptcy, could not operate to defeat the claim of his assignees.

It appeared to me at the hearing that I could not properly enter upon the consideration of this point of law without first coming to a conclusion upon the fact, whether the name of the bankrupt was or not used in the indenture of January, 1812, as a trustee for the defendant J. Rowe, and I directed an issue accordingly. At the trial of this issue, the jury found that the name of the bankrupt was used as a trustee for J. Rowe; and a motion having been made before me by the plaintiffs for a new trial of that issue, I refused to disturb the verdict.

The question which has now been mainly argued before me is, whether the indenture of the 24th August, 1813, having been executed by the bankrupt subsequent to his bankruptcy, can or not be received as against his assignees as a declaration of trust in writing. Upon a consideration of the several cases which have been referred to in the argument, it does not appear to me that any authority has been produced which is directly in point. All the cases establish that a bankrupt cannot, by any act subsequent to his bankruptcy, transfer any interest from his assignees. Thus, a bankrupt cannot defeat the interest of his assignees by a power of appointment. Can the bankrupt be said to have any interest in this mine at the time of his bankruptcy? He might have recovered possession of this mine by force of his legal title; but he would then have recovered, not in respect of his interest, but by converting a statute, made for the prevention of fraud, into an instrument of his own fraud. It is not disputed that this deed of August, 1813, would have prevailed against the assignees, as a declaration of trust, if it had been executed before the bankruptcy. Yet a mere voluntary deed, executed before the bankruptcy, will not prevail against the assignees. This deed, therefore, in respect to the moral obligation on the trustee to give effect to his trust, would not, in such case, have been considered as a mere voluntary deed. If, in respect of the moral obligation affecting the trustee, this declaration of trust would have prevailed against the assignees if executed the day before the bankruptcy, without any other consideration, I cannot find a principle why it should not prevail against the assignees, if executed the day after the bankruptcy, especially when it is considered that a trust does not pass by assignment in the bankruptcy. For these reasons, I am of opinion that the indenture of 24th August, 1813, though executed after the bankruptcy, is a good declaration of trust in favor of J. Rowe, within the Statute of Frauds. It has been slightly argued that the letters of the bankrupt do manifest a trust in writing within the Statute of Frauds; and, further, that a trust in this case is to be implied from the fact that Rowe actually directed the working of the mine, and paid the expenses of it; but I do not think it necessary to give any opinion on these points. The bill must therefore be dismissed, and with costs.[1]

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[1] Affirmed in 5 Russ. 258. Ambrose *v.* Ambrose, 1 P. Wms. 321; *In Re* Farmer, 18 N. B. R. 207, 216 (*semble*) *Accord.* 56 N.J.E. 524

See also Smith *v.* Howell, 3 Stockt. 349.

If the trustee of land under an oral trust, in recognition of his moral duty, conveys to the *cestui que trust* or to his appointee, the conveyance cannot be impeached by the trustee's creditors. Gordon *v.* Tweedy, 71 Ala. 202; Van Dorn *v.* Leeper, 95 Ill. 35; First Bank *v.* Kurtz, 22 Ill. Ap. 213; Cox *v.* Arnemann, 76 Ind. 210; Clark *v.* Rucker, 7 B. Mon. 583; Brown *v.* Lunt, 37 Me. 423; Patton *v.* Chamberlain, 44 Mich. 5; Jamison *v.* Miller, 27 N. J. Eq. 586; Siemon *v.* Scharck, 29 N. Y. 598; Dygert *v.* Remerschnider, 32 N. Y. 629; Foote *v.* Bryant, 47 N. Y. 544; Cramer *v.* Blood, 48 N. Y. 684; Norton *v.* Mallory, 63 N. Y. 434; Robbins *v.* Robbins, 89 N. Y. 251, 257; Davis *v.* Graves, 29 Barb. 480; Baldwin *v.* Ryan, 3 Th. & C. 251; Holden *v.* Burnham, 5 Th. & C. 195; Burdick *v.* Jackson, 7 Hun, 488; Ocean Bank *v.* Hodges, 9 Hun, 161; Powell *v.* Ivey, 88 N. Ca. 256; Sackett *v.* Spencer, 65 Pa. 89 (but see, *contra*, O'Hara *v.* Dilworth, 72 Pa. 397); Price *v.* Brown, 4 S. Ca. N. S. 144 (*semble*); Hyde *v.* Chapman, 33 Wis. 391. But see, *contra*, Smith *v.* Lane, 3 Pick. 205; Holmes *v.* Winchester, 135 Mass. 299. (Compare, however, Bancroft *v.* Curtis, 108 Mass. 47, and Bush *v.* Boutelle [Massachusetts, 1892], 30 N. E. R. 607). 155 Mass. 67

88 Ga 355
47 Minn 9
131 Fed. 6

In Hays *v.* Regen, 102 Ind. 524; McVay *v.* McVay, 43 N. J. Eq. 47, 49; Pinney *v.* Fellows, 15 Vt. 525; and Main *v.* Bosworth, 77 Wis. 660, the conveyance was allowed to stand although made after the creditor of the trustee had obtained a judgment lien upon the land. But see, *contra*, Connor *v.* Follansbee, 59 N. H. 124; Dewey *v.* Dewey, 35 Vt. 555, 560 (*semble*); Skinner *v.* James, 69 Wis. 605. 131 Fed. 617. [illegible]

An oral contract by a bachelor to convey land, if performed after his marriage, deprives his wife of dower. Oldham *v.* Sale, 1 B. Mon. 76. [illegible]

A. contracts orally to convey certain land to B. He then contracts in writing to convey the same land to C.; and finally conveys to B., who has notice of the written contract in favor of C., B. may keep the land. Dawson *v.* Ellis, 1 J. & W. 524 (*semble*); Clarke *v.* Rucker, 7 B. Mon. 583, 585 (*semble*). 31 Pa. 341 ~~131 Fed. 617~~

A judgment against the *cestui que trust* under an oral trust attaches to the land subsequently conveyed to him. Lloyd's App., 82 Pa. 485.

If the principal case is sound, it would seem to follow that a post-nuptial settlement in fulfilment of an oral ante-nuptial agreement to settle specific property in consideration of the marriage, must be effectual against the settlor's creditors. And there is authority for this position. Griffin *v.* Stanhope, Cro. Jac 454; Bovy's Case, 1 Vent. 193 (*semble*); Lavender *v.* Blackstone, 2 Lev. 146, 147 (*semble*); Montacute *v.* Max-

TIERNEY *v.* WOOD.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., JUNE 3, 6, 27, 1854.

[*Reported in* 19 *Beavan*, 330.]

IN January, 1836, Alexander Wood purchased a house, a close of land, and premises, situate at Little Hampton, in Sussex, for the sum of £490. They were conveyed to the plaintiff Tierney in fee, who admitted he held them in trust for Wood.

About the same time, Wood transferred a sum of stock into the plaintiff's name; but by his direction the plaintiff afterwards sold it out, and delivered the proceeds of the sale to Wood.

Soon after the purchase of the house, land, and premises, Wood delivered to the plaintiff a paper writing, signed by him, and dated January, 1837, in these words: "I hereby desire that, after my death, the stock now in the Bank of England, with the house and land now belonging to me at Little Hampton, shall be held by you, as you at present hold it, for the benefit of my wife, Elizabeth Wood, during her life, and that after her death the same shall continue to be held by you as aforesaid, for the sole benefit of my daughter, Mary Wood, in such sort that it shall be wholly and entirely free from all control of any person with whom she may intermarry. I further desire that, in case my said daughter Mary should leave issue by any marriage which she may contract, the whole of the above property shall pass to such issue, in such manner as she may direct; but that, in case she should die without issue, the whole of the above property shall be equally divided among the lawful issue of my son Alexander Wood, born after 1834, he to have the interest and profits arising from the property during his life. If my son should die without issue, I desire that all the property

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well, 1 Stra. 236, per Lord Macclesfield; Dundas *v.* Dutens, 1 Ves. Jr. 196, 2 Cox, 235, per Lord Thurlow; Shaw *v.* Jakeman, 4 East, 201, 207, per Lord Ellenborough; Surcome *v.* Pinniger, 3 DeG., M. & G. 571, 575, per L. J. Turner; Hussey *v.* Castle, 41 Cal. 239; Satterthwaite *v.* Emley, 3 Green, Ch. 489; Hall *v.* Light, 2 Duv. 358.

There is, however, considerable authority to the contrary. Spurgeon *v.* Collier, 1 Eden, 55, per Lord Northington; Randall *v.* Morgan, 12 Ves. 67, per Sir W. Grant; Warden *v.* Jones, 2 DeG. & J. 76; Trowell *v.* Shewton, 8 Ch. Div. 318 (*semble*); L'Estrange *v.* Robinson, 1 Hog. 202; Lloyd *v.* Fulton, 91 U. S. 479 (*semble*); Andrews *v.* Jones, 10 Ala. 421 (*semble*); Winn *v.* Albert, 5 Md. 66, 2 Md. Ch. 169; Wood *v.* Savage, 2 Doug. (Mich.) 316; Manke *v.* Manke, 75 Mich. 435 (*semble*); Reade *v.* Livingston, 3 Johns. Ch. 481 (*semble*); Borst *v.* Corey, 16 Barb. 136; Izard *v.* Izard, Bail. Eq. 228; Davidson *v.* Graves, Riley, Eq. 219; Smith *v.* Greer, 3 Humph. 118. The case of Warden *v.* Jones, *supra*, was decided largely on the strength of Sir W. Grant's *dictum* in Randall *v.* Morgan, *supra*, that a subsequent memorandum of the prior oral ante-nuptial agreement would not satisfy the Statute of Frauds. This *dictum* has been explicitly overruled. Barkworth *v.* Young, 4 Drew. 1, 12. There is a vigorous and pointed criticism of Warden *v.* Jones in 5 Jur. N. S. (Part II.), 46. Furthermore, that case is hardly to be reconciled with the decision in *Ex parte* Whitehead, 14 Q. B. Div. 419. — ED.

may be sold, and the money be equally divided among my late brother's children now living at Old Craig," &c. "After the death of my wife, I wish my son Alexander to be paid £100 in money, or to be paid £5 a year during his life. If my son Alexander and my daughter Mary have both issue, let the property be equally divided among them; if they have no issue, give £100 to such charity as Mr. Jones's at St. Leonards. Let my son have my books on gardening, my shirts, or any of my clothes that may be of use to him, if he desire to have them.

"ALEXANDER WOOD. January, 1837.

"To the Rev. M. A. TIERNEY."

Alexander Wood, the elder, died in 1841, intestate, and the plaintiff allowed Mrs. Wood, his widow, to receive the rents of the premises, till her death in June, 1853.

Alexander Wood, the son and heir at law of Alexander Wood the elder, and Mary Wood, the daughter, were living; but the latter has never been married, and questions having arisen as to the rights of the parties interested in the property of Alexander Wood the elder, and as to the effect of the paper writing, the plaintiff instituted the suit to obtain the opinion of the court thereon.

Mr. Riddell, for the plaintiff.

Mr. Nichols, for Alexander Wood, the heir at law.

Mr. Fleming, for the daughter Mary.

THE MASTER OF THE ROLLS was of opinion that Mary Wood took an estate tail, but reserved his judgment as to the validity of the declaration of trust.

THE MASTER OF THE ROLLS. The question is, whether the document dated in January, 1837, created a good declaration of trust within the seventh section of the Statute of Frauds. That clause is in these words, or to this effect: That after the 24th of June, 1677, all declarations or creations of trusts, or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

The first question raised is, whether Alexander Wood is the person who is by law enabled to declare the trusts of these lands.

The second question is, whether, if he be, this is a declaration of trust, and such a one as can be acted upon.

There is no question but that on the purchase of this property by Alexander Wood, and the conveyance thereof to the Rev. M. A. Tierney, a resulting trust arose in favor of Alexander Wood, which, as it is expressly excepted by the eighth section of the Statute of Frauds, does not require to be evidenced by any writing. In the year 1836, therefore, and previous to the signing of this document, the property in question was vested in M. A. Tierney, in fee, in trust for Alexander

Wood, in fee simple. Alexander Wood, therefore, was the beneficial owner of this property, and Mr. Tierney had the mere naked legal interest in it. A distinction may be raised between the person who is by law enabled to declare, and the person who is by law entitled to create the trust. I consider, in the first place, who was by law entitled to create a trust in this property; and, first, I examine what, in such a state of things, would have been the effect of this document, so far as it relates to the stock, which had been transferred into the name of M. A. Tierney, if this had not been sold out afterwards by the direction of Alexander Wood, and the direction to pay the dividends had been complied with by Tierney. The result would have been that the relation of trustee and *cestui que trust* between Tierney and the person mentioned in the instrument would have been completed, so far as that stock was concerned, and the fact that the document had been a voluntary act on the part of Wood would not have prevented this court from acting upon it. The case of *Ex parte* Pye and Dubost, and the authorities referred to in Bridge *v.* Bridge,[1] decided by myself, establish this proposition. Those authorities show that the proper person to create the trust in personal property is the person in whom the beneficial interest of the property is vested; and the trust being created by the beneficial owner, the trustee is bound, and, if disposed to refuse, may be compelled, to obey it.

I am at a loss to find any reason which should cause this document to be effectual as a declaration of trust, so far as the stock is concerned, and not so, so far as the land is concerned. It is obvious that in both cases the person enabled by law to declare the trusts is the same. In the case before me, there can be no doubt that, if Mr. Tierney had, in pursuance of this paper, signed a document to the same effect, stating that he held the property on the trusts therein mentioned, the trusts would, apart from any question on the construction of the document, have been fully and completely declared; and it is also clear, that if the trustee had declared that he held the property on any trusts not recognized or sanctioned by Alexander Wood, the beneficial owner, such declaration of trust would have been insufficient and unavailing, and would have given no interest to the supposed *cestui que trust*. A declaration of trust in writing by Tierney following that of Wood would therefore have been merely formal, and would have been valid only so far as it followed his instructions, and would have been void to the extent, if any, that it departed from his directions. I think that the fair conclusion to be drawn from these considerations is, that the person to create the trust, and the person who is by law enabled to declare the trust, are one and the same; and that, consequently, the beneficial owner is the person by law enabled to declare the trust.

This is confirmed by the expression in the clause in the statute which relates to "the last will in writing," which can only apply to the beneficial owner. It may also be observed, that if the statute had intended that no trust should be valid, unless evidenced by a writing signed by the trustees, the simple and obvious course would have been to have so stated it; but the expression used is not "the trustee," but "the person by law enabled to declare the trust." That person is, I think, the beneficial owner; and I am of opinion that, apart from any question of the construction of the document, the fact of its having been signed by Wood, the beneficial owner, transmitted by him to Tierney, the legal owner, and by him acted upon, constitutes it a sufficient declaration of trust within the seventh clause of the statute, so far as that clause requires it to be signed "by the party who is by law enabled to declare such trust."

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[1] 16 Beav. 315.

The next question is, whether the document itself, apart from the signature, is or purports to be a declaration of trust at all. It is contended that, if anything, it is a will imperfectly executed, that it contains no direction as to the present application of the rents, and that the rest of its contents savor of the directions contained in a will rather than of a direction how to apply the rents of the property; for that it is not to take effect till after the death of Alexander Wood, and that it contains directions for sale and the like, inconsistent with the nature and duties of the trust which M. A. Tierney had accepted. There is, undoubtedly, some force in these observations; but, on the whole, I think that this may be treated as a valid declaration of trust. Although it does not declare the whole trust, it declares the trust of a part, and it leaves the resulting trust untouched, except where it expressly interferes therewith. If this document had directed Mr. Tierney to pay the rent to Mr. Wood during his life, and had then proceeded as it does, this objection could not, in my opinion, have been sustained; but this omission is not sufficient to destroy the character of the rest of the interest, which, unless where it otherwise disposes of the beneficial interest in the property, leaves it untouched, under the resulting trust vested in Mr. Wood. I am of opinion, therefore, that a good trust was evidenced by this writing within the Statute of Frauds.

The only remaining question is the interest which Mary Wood takes in the land so held in trust for her, and my opinion is that she takes an estate tail.[1]

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[1] Kronheim v. Johnson, 7 Ch. D. 60 *Accord.* — Ed.

A bought land that it conveyed to B
to [illegible] in trust upon him. [illegible]
delivered to B a signed paper which [illegible]
B how to dispose of the land after his
(A's) death. The question was whether this paper
satisfied the S. of F. Held: A had the beneficial
interest in the land and it is proper for him
to declare the trust. The fact that A failed
to direct what should be done with the
rents till his death do not vitiate the

ELIZA A. DANSER *v.* WILLIAM WARWICK.

IN CHANCERY, NEW JERSEY, BEFORE HON. A. V. VAN FLEET, V. C.,
OCTOBER TERM, 1880.

[*Reported in* 33 *New Jersey Equity Reports,* 133.]

ON final hearing on bill, answer, and proofs taken before a master.

Mr. George C. Beekman, for complainant.

Mr. Joel Parker, for defendant.

THE VICE CHANCELLOR. The complainant is the widow of David C. Danser. She seeks to have a parol trust established and enforced against the defendant. She alleges that her husband, some months before his death, assigned the bond and mortgage in controversy to the defendant, upon a parol trust or understanding that he would forthwith, or by a short day, transfer them to her. The transfer to the defendant was intended to be merely a step in vesting her with title. The assignment to the defendant bears date February 1st, 1875, and Danser died on the 13th day of the following September. The bond and mortgage were in Danser's possession at the time of his death, and have since then been constantly in the possession of the complainant. The defendant has never asked for them, nor attempted to get possession of them. A month or six weeks prior to Danser's death, the defendant directed an assignment to be drawn to the complainant, stating to the person to whom he gave the direction that he must draw it for Danser, who would pay him. He, at the same time, said it was right that the old lady — referring to the complainant — should have the bond and mortgage. Danser, at this time, was prostrated by the disease which shortly afterwards caused his death. The defendant did not remain to execute the assignment, but said he would return soon and do so. He did not return that day. He was subsequently informed, on two or three different occasions, while Danser was living, that the assignment had been drawn and was ready for execution. On each occasion he said he had forgotten or neglected to execute it, but would call soon and do so. He never fulfilled his promise. Two or three weeks after Danser's death, he called for the assignment Danser had made to him, and which he had left when he gave direction for the draft of the one to the complainant, and stated that he meant to do what was right about the matter, but he would not execute the assignment to the complainant until things were fixed up; Danser owed him. He took both papers and has never executed the assignment to the complainant.

This narrative comprises only those facts which are not disputed by either party.

The defendant denies that the mortgage was transferred to him subject to a trust, but says, on the contrary, that the assignment was made to satisfy a promissory note he held against Danser, upon which there was due $2,000 of principal, and a year and six or seven months' interest. His explanation of the preparation, by his direction, of an assignment to the complainant is this: he says, some time after the execution of the assignment to him, he ascertained that the person who made the mortgage had no title on record for the mortgaged premises; that he went at once to Danser and told him he had swindled him, and that if he did not take the mortgage back he would make him. He says that Danser replied that the mortgagor's title was all right, but if he was dissatisfied, he would pay him his debt, or give him another security, and he could then reassign the mortgage. He further says that it was ultimately arranged that Danser should have two mortgages, which were then liens on his lands, cancelled, and execute a mortgage thereon to him, and he was then to assign the mortgage in controversy to the complainant. He says it was after this scheme had been agreed upon that he ordered the assignment to the complainant to be drawn.

These statements present the question of fact to be decided. The counsel of the defendant, however, insists that, as a matter of law, the bill in this case must be dismissed, regardless of what the evidence demonstrates the truth to be in respect to the trust alleged, his contention being that the trust set up by the complainant is one which cannot be established except by written evidence. The trust, it will be observed, affects personal property, and not lands. The subject of it is a debt. That part of the Statute of Frauds which enacts that all declarations and creations of trust shall be manifested by writing and signed by the party creating the same, or else shall be void and of no effect, applies only to trusts of lands, and has no application to trusts of personal property.[1] A valid trust of personalty may be created verbally, and proved by parol evidence. A trust of personal property, almost precisely like the one under consideration, and which had been created by mere spoken words, and was supported by only parol evidence, was upheld by Chancellor Williamson in Hooper *v.* Holmes;[1] also Kimball *v.* Morton,[2] Sayre *v.* Fredericks,[3] and Eaton *v.* Cook;[4] 2 Story's Eq. Jur. § 972; 1 Perry on Trusts, § 86. A valid trust of a mortgage debt may be created by parol; for, though a trust thus created cannot embrace the land held in pledge, yet it is good as to the debt, and will entitle the *cestui que trust* to sufficient of the proceeds of sale, when the land is converted into money, to pay the debt.[5] Sayre *v.* Fredericks,[3] Benbow *v.* Townsend,[6] and Childs *v.* Jordan.[7]

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[1] Fane *v.* Fane, 1 Vern. 31 (*semble*); Bayley *v.* Boulcott, 4 Russ. 346 (*semble*); Hawkins *v.* Gardner, 2 Sm. & G. 441, 451; Peckham *v.* Taylor, 31 Beav. 250; Grant *v.* Grant, 34 Beav. 623, 625; Allen *v.* Withrow, 110 U. S. 119, 129; Crabb *v.* Thomas, 25 Ala. 212, 215; Hellman *v.* McWilliams, 70 Cal. 449; Kirkpatrick *v.* Davidson, 2 Ga. 297; Hon *v.* Hon, 70 Ind. 135; Collins *v.* Gibson, 29 Iowa, 61; Cobb *v.* Knight, 74 Me. 253; Chase *v.* Perley, 148 Mass. 289; Catlin *v.* Birchard, 13 Mich. 110; Bostwick *v.* Mahaffy, 48 Mich. 342; Kramer *v.* McCaugley, 11 Mo. Ap. 426; Kimball *v.* Morton, 1 Halst. Ch. 26; Hooper *v.* Holmes, 3 Stockt. 122; Day *v.* Roth, 18 N. Y. 448; Gadsden *v.* Whaley, 14 S. Ca. 210; Harris *v.* Union Bank, 1 Cold. 152; Porter *v.* Rutland Bank, 19 Vt. 410, 419 *Accord.*

Similarly, if the grantee of land upon an oral trust converts the land into personalty and admits orally that he holds the personalty upon the original trust, he is of course chargeable. Calder *v.* Moran, 49 Mich. 14; Tracy *v.* Tracy, 3 Bradf. 56; Mahit *v.* Rynd, 69 Pa. 380; Everhart's App., 106 Pa. 349; Hess's App. 112 Pa. 168.

An oral agreement by A. to hold land in trust for B., and to pay him the proceeds in case of a sale, is within the statute. But an oral agreement by the grantee holding under an oral trust simply to pay the *cestui que trust* the proceeds in case of sale, is not within the statute, and may be enforced if supported by a valid consideration. Mohn *v.* Mohn, 112 Ind. 295; Thomas *v.* Mowry, 113 Ind. 83.

CHATTELS REAL are of course within the statute. Skett *v.* Whitmore, Freem. Ch. 280; Riddle *v.* Emerson, 1 Vern. 108; Bellasis *v.* Compton, 2 Vern. 294; Hutchins *v.* Lee, 1 Atk. 447. — ED.

It must be held, then, that the trust alleged in this case is valid, and, if it has been sufficiently proved, the complainant is entitled to have it established and enforced.[8]

There must be a decree establishing the trust, and requiring the defendant to execute it. The defendant must pay costs.

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[1] 3 Stockt. 122.

[2] 1 Hal. Ch. 26.

[3] 1 C. E. Gr. 205.

[4] 10 C. E. Gr. 55.

4 Allen 525
7 Mich 241

[5] Bellasis *v.* Compton, 2 Vern. 294; Benbow *v.* Townsend, 1 M. & K. 510 (*semble*); Patterson *v.* Mills, 69 Iowa, 755; Childs *v.* Jordan, 106 Mass. 321; Bucklin *v.* Bucklin, 1 Abb. Ap. 242, 1 Keyes, 141, s. c.; Bunn *v.* Vaughan, 1 Abb. Ap. 253; Robbins *v.* Robbins, 89 N. Y. 258 *Accord.* — Ed.

[6] 1 M. & K. 506.

[7] 106 Mass. 321.

[8] The Court found the facts in favor of the complainant. So much of the opinion as relates thereto is omitted. — Ed.

A valid trust of a mortgage
debt may be created by parol
because it is personalty.

SECTION IX.

The Statute of Wills.

JUNIPER *v.* BATCHELOR.

IN CHANCERY, BEFORE SIR G. M. GIFFARD, V. C., JUNE 26, 1868.

[*Reported in Weekly Notes* (1868), 197.]

CHARLES JUNIPER, by a will dated the 14th of March, 1864, devised and bequeathed all his real and personal estate to W. Batchelor, T. Batchelor, T. Caffyn, and T. B. Penfold, their heirs, executors, administrators, and assigns, absolutely, as tenants in common, devised to them all the estates vested in him as trustee and mortgagee, and appointed them his executors. On the 20th of January, 1866, he made his last will in substantially the same terms, but in favor of the said W. Batchelor and T. Batchelor, J. Burster (instead of T. Caffyn), and the said T. B. Penfold. On the 6th of June, 1866, he died, and his will was proved by T. Batchelor, Burster, and Penfold only. Shortly after his death a tin box was found soldered up, in which, when opened, were discovered four letters, purporting to be signed by the testator, all dated the 14th of March, 1864, and in the same terms, and addressed to W. Batchelor, T. Batchelor, T. Caffyn, and T. B. Penfold respectively. Each letter was to the effect that the writer wished the person addressed to retain for himself out of the estate £200, and that, after payment of succession and legacy duties and expenses, the surplus which would be realized by public auction sale of his estate should be given to the Sussex County Hospital, Brighton. The bill was filed by the heir at law and customary heir of the testator, alleging that the real and personal estate was devised to the four devisees on a concealed trust for charitable purposes, which they promised and agreed to perform, and prayed for a declaration that the devise and bequest might be declared void, or that the devisees might be declared trustees for the plaintiffs, and might be decreed to convey and surrender the same. T. Batchelor said he agreed to be the testator's executor, but the testator said nothing to him about the disposition of his property. Burster said the same, and that the testator said something about letters, but he (Burster) did not know what he meant. Testator said he had quarrelled with Caffyn. Penfold said he promised to be the testator's executor, and testator said "there would be letters found," but did not explain what he meant. On the 12th of July, 1866, the testator's real and personal estate was conveyed by the four trustees to a trustee for the three who had proved the will.

Kay, Q. C., and *Ince*, for the plaintiffs.

Druce, Q. C., and *G. N. Colt*, for the defendants, the devisees, and *Wickens* for the defendant, the Attorney General, were not called upon.

The Vice Chancellor said he did not think the communications had gone far enough to bring the case within the authorities which had been cited. The testator asked these devisees to be his executors. They said they would. Nothing intelligible was said about letters; nothing about the will of the testator; nothing about his intention. If there had been no letters, it was conceded that the devisees would have been entitled. Then how could it be contended that they made any difference, if they were not communicated in some shape or form to these persons? (Some knowledge must be made out of the testator's intention, sufficient to have made it a fraud for these devisees to retain the property.) Nothing of that kind had been established; and the bill must be dismissed with costs.[1]

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[1] Adlington v. Cann, 3 Atk. 141, 151; Muckleston v. Brown, 6 Ves. 52, 62–63 (explaining Bishop v. Talbot, 6 Ves. 60, cited); Wallgrave v. Tebbs, 2 K. & J. 313; Tee v. Ferris, 2 K. & J. 357; Irvine v. Sullivan, 8 Eq. 673; Schultz's App., 80 Pa. 396 *Accord.*

The *dicta contra* in Fane v. Fane, 1 Vern. 30, and Boson v. Statham, 1 Eden, 514, are not law.

On the other hand, extrinsic evidence that a gratuitous deed was not intended to benefit the grantee, although not communicated to the grantee, is competent to turn him into a constructive trustee for the grantor. Birch v. Blagrave, Amb. 264; Childers v. Childers, 1 DeG. & J. 482. But see, *contra*, Todd v. Munson, 53 Conn. 579. — Ed.

A [illegible] all his estate to 4
devisees, ~~[illegible]~~ B, C, D, E, who he made
executors, [illegible] it to [illegible] (D)
The will was proved by C, E, & G
In a sealed box were found 4 le
one addressed to each devisee, dir
each one to take 200£, pay al
the expenses & give the bala
of his estate to a certain charity.
Two of the devisees had known from
that certain letters existed but no
intelligible. Held: [illegible]

The testator directed that his solicitor be
the solicitor of the trustees in the settlement
of the estate. Held: [illegible]
[illegible] and employ
another solicitor [illegible] in his place!

SECTION X.

The Subject Matter of a Trust.

FOSTER *v.* ELSLEY.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, DECEMBER 13, 1881.

[*Reported in* 19 *Chancery Division*, 518.]

GEORGE MAY UPFIELD, by his will, dated the 31st of October, 1879, after appointing the defendants his executors and trustees, devised and bequeathed to them all his real and personal estate upon the trusts therein set forth, and the will contained the following clause: "And I declare that my solicitor, William Edward Foster" (the plaintiff), "shall be the solicitor to my estate and to my said trustees in the management and carrying out the provisions of this my will."

The testator died on the 3d of November, 1879, and his will was subsequently proved by the defendants, who, in pursuance of the directions contained in the will, employed the plaintiff as their solicitor in the management of the trust estate up to the 13th of October, 1881, when he received a letter from certain solicitors at Oldham stating that they were instructed by the defendants to ask for the immediate delivery of all deeds, documents, and securities in his possession, relating to the estate of the testator, and also an account of costs due to the plaintiff, and also for an appointment for them to attend at the plaintiff's office and pay such costs, and receive the documents.

This was a motion by the plaintiff to restrain the defendants from employing any person other than the plaintiff as solicitor to the estate of the testator, or in any business relating to the management or carrying out of the provisions of his will.

Dundas Gardiner, in support of the motion. The testator has thought fit to appoint Mr. Foster solicitor to his estate and to his trustees, and they cannot, I submit, arbitrarily remove him from the office, nothing being charged against him in the discharge of his duties. I rely upon Williams *v.* Corbet[1] and Hibbert *v.* Hibbert.[2]

Ince, Q. C., and *Hamilton Humphreys*, for the defendants, were not called upon, but referred to Shaw *v.* Lawless,[3] and Finden *v.* Stephens.[4]

CHITTY, J. The testator in this case has inserted a clause in his will that "my solicitor, W. E. Foster, shall be the solicitor to my estate and to my said trustees in the management and carrying out the provisions of this my will," and this motion is founded on the proposition that this clause imposes on his trustees the duty of employing this gentleman (the plaintiff) as their solicitor. In Finden *v.* Stephens, to which I have been referred, the direction was that a certain person should be employed as agent and manager of the testator's estates whenever his trustees should have occasion for the services of a person in that capacity, and it was held that the direction did not create a trust which such person could enforce. The case of Shaw *v.* Lawless, in the House of Lords, had previously decided the question. I am told that no case is to be found in the books like the one before me where a testator has appointed a particular person as solicitor to his estate, but in analogy to the cases to which I have referred I decide that the direction in this will imposes no trust or duty on the trustees to continue the plaintiff as their solicitor, and that being my decision I refuse this motion with costs.[1]

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[1] 8 Sim. 349.

[2] 3 Mer. 681.

[3] 5 Cl. & F. 129.

[4] 2 Ph. 142.

GRAVES *v.* GRAVES.

In Chancery, Ireland, before Brady, C., May 8, 1862.

[*Reported in* 13 *Irish Chancery Reports,* 182.]

William Graves, by his will, devised certain real and personal property to trustees upon trust, amongst other things, to pay to his wife an annuity of £100 a year for life, in addition to her jointure, and also to pay to his sister an annuity of £50 a year for life. The will then contained the following passage: "And I do hereby declare it to be my earnest wish that my said sister shall reside at Gravesend with my dear wife during her life." The testator devised his house at Gravesend, with the household furniture, &c., to his wife for life. Mr. Graves died in 1853. Misunderstandings having arisen between Mrs. and Miss Graves, they, in 1853, ceased to live together; and the petition in this cause was filed by Miss Graves, praying a declaration of her right to reside at Gravesend during her life, and to be boarded by Mrs. Graves.

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[1] Shaw *v.* Lawless, 5 Cl. & F. 129 ("And it is also my particular desire, that my said executors, whilst acting in the management of all or any of my affairs under this my will, . . . shall continue the said B. E. L. in the receipt and management of my said rents, . . . at the usual fees allowed to agents, he having acted for me since I became possessed of said estate fully to my satisfaction").

Finden *v.* Stephens, 2 Phill. 142 ("And inasmuch as my estates and property will require more management than I can expect of my trustees personally to bestow, it is my wish and desire that T. F., . . . in whose judgment and integrity I place great confidence, be appointed for all purposes for which they or he, my trustees and trustee, may have occasion for an agent, receiver, or manager of all or any of my estates and property") *Accord.*

But see, *contra :*

Hibbert *v.* Hibbert, 3 Mer. 681 (Testator devised to trustees and directed that his friend A. H. should be appointed receiver of his real and personal estates, adding that he made that appointment for the sake of benefiting A. H. in a pecuniary point of view).

Williams *v.* Corbet, 8 Sim. 349 (Testator devised to trustees and appointed plaintiff to be the auditor of the accounts of his estates during the execution of the trust of his will, and directed his trustees to pay to the plaintiff the customary remuneration for such services). — Ed.

Mr. Warren and *Mr. Dames*, for the petitioner.

Mr. Brewster and *Mr. A. Henderson*, *contra.*[1]

THE LORD CHANCELLOR. There can be no doubt that an expression of the testator's wish may attach on the property devised by him, and may be enforced by this court; but we are always bound to consider the subject matter to be effected, and to see what the testator really intended to be done.

Had this expression of wish been attached on any property, as upon a house, it would be one thing; as, if he had said, "I wish that my sister should reside in my house at Gravesend," it might be said that this gave her a right to have a portion of the house allotted to her. Those, however, are not the words of the present will, which says, "I declare it to be my earnest wish that my said sister shall reside at Gravesend with my dear wife during her life." What does that mean? It means, if anything, that they should reside together. He intends, with respect to both, for the sake of mutual society and comfort, that they should pass their lives together. I should hesitate long before saying that this was a trust which this court would enforce. The right of maintenance is given up; but if it were not, could this court be called on to say which was right and which was wrong, in their misunderstanding, or to say that they were to be compelled to spend their time together? The will, however, in my opinion, does not point to residence as property in the house, but to residence with Mrs. Graves as a member of her family. I cannot give an equivalent. An equivalent would destroy a part of the bequest, the intention of which was to give to each from the other the benefit of society and intercourse. I cannot say that a residence, or payment for one, would be an equivalent; and if these ladies cannot agree to live together on friendly terms, I cannot compel them.[2]

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[1] The arguments of counsel are omitted. — ED.

[2] See Dawkin *v.* Penrhyn, 4 App. Cas. 51.

Real estate forms the specific *res* in most trusts. But personal property may, of course, be held in trust as freely as land; and choses in action as well as choses in possession. Fletcher *v.* Fletcher, *supra*, 66, n. 2; Williams *v.* Codrington, 1 Ves. Sr. 514; Clough *v.* Lambert, 10 Sim. 174; Murray *v.* Flavell, 25 Ch. Div. 89, 102; Eldridge *v.* Turner, 11 Ala. 1049; Gordon *v.* Small, 53 Md. 550; Danser *v.* Warwick, *supra*, 186, 188; Cummins *v.* Barkalon, 1 Abb. Ap. 479; Fogg *v.* Middleton, *supra*, 65.

Purely personal rights cannot be held in trust; e. g. a peerage, an office, and the like. Buckhurst Peerage, 2 App. Cas. 1; 1 Gray, Cases on Property, Chap. IV.

On grounds of public policy there are a few exceptions to the rule that whatever may be transferred may be the subject of a trust; e. g. a homestead entry: Clark *v.* Bayley, 5 Oreg. 343. An improvement right: Smith *v.* Oliver, 11 S. & R. 257. Formerly the registered owner of a ship under the English Registry Acts could not be an express trustee of the ship. *Ex parte* Yallop, 15 Ves. 60; *Ex parte* Houghton, 17 Ves. 251; Camden *v.* Anderson, 5 T. R. 709; although in case of fraud he might be a constructive trustee. Holderness *v.* Lamport, 29 Beav. 129. At the present day, however, a registered ship may be the subject of a trust; but the trust cannot be registered. Chasteauneuf *v.* Capeyron, 7 App. Cas. 127. The same rule applies to patents: Edmunds, Letters Patent, 503. Trade marks: Sebastian, Trade Marks (3d ed.) 108. Shares in English companies: Buckley, Companies Acts, (6th ed.) 85–87. — Ed.

Trade secret – 1 S & S. 398.

SECTION XI.

The Cestui que Trust.

MORICE *v.* THE BISHOP OF DURHAM.

IN CHANCERY, BEFORE LORD ELDON, C., MARCH 18, 20, 1805.

[*Reported in* 10 *Vesey*, 521.]

THIS cause came on upon an appeal by the defendant, the Bishop of Durham, from the decree of the Master of the Rolls.

Ann Cracherode, by her will, dated the 16th of April, 1801, and duly executed to pass real estate, after giving several legacies to her next of kin and others, some of which she directed to be paid out of the produce of her real estate, directed to be sold, bequeathed all her personal estate to the Bishop of Durham, his executors, &c., upon trust to pay her debts and legacies, &c.; and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of; and she appointed the Bishop her sole executor.

The bill was filed by the next of kin to have the will established except as to the residuary bequest, and that such bequest may be declared void. The Attorney General was made a defendant. The Bishop, by his answer, expressly disclaimed any beneficial interest in himself personally.[1]

Mr. Richards and *Mr. Martin*, in support of the appeal.

The Attorney General (*Hon. Spencer Perceval*) and *Mr. Mitford*, against the decree.[2]

THE LORD CHANCELLOR (ELDON). This, with the single exception of Brown *v.* Yeall,[3] is a new case. The questions are, 1st, Whether a trust was intended to be created at all? 2dly, Whether it was effectually created? 3dly, If ineffectually created, whether the defendant, the Bishop of Durham, can, according to the decisions, and upon the authority of those decisions, take this property for his own use and benefit. As to the last, I understand a doubt has been raised in the discussion of some question bearing analogy to this in another court, — how far it is competent to a testator to give to his friend his personal estate, to apply it to such purposes of bounty not arising to trust as the testator himself would have been likely to apply it to. That question, as far as this court has to do with it, depends altogether upon this: if the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon this ground, according to the authorities, — that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and discretion whether to make the application or not, it is absolutely given, and it is the effect of his own will and not the obligation imposed by the testament: the one inclining, the other compelling, him to execute the purpose. But if he cannot, or was not intended to, be compelled, the question is not then upon a trust that has failed, or the intent to create a trust; but the will must be read as if no such intention was expressed or to be discovered in it.

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[1] The statement of facts is taken from the report of the case in 9 Ves. 399.

[2] The arguments of counsel are omitted. — ED.

[3] 7 Ves. 50, n.

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Held: The
objects were
so indefinite that th
court could not enforce the tru
& no trust was created & next
of kin must get the prop.

Pierson *v.* Garnet,[1] and the other cases of that class, do not bear upon this in any degree; for the question, whether a trust was intended, arose from two or three circumstances, which must all concur where there is no express trust. *Prima facie* an absolute interest was given, and the question was, whether precatory, not mandatory, words imposed a trust upon that person; and the court has said, before those words of request or accommodation create a trust, it must be shown that the object and the subject are certain; and it is not immaterial to this case that it must be shown that the objects are certain. If neither the objects nor the subject are certain, then the recommendation or request does not create a trust; for of necessity the alleged trustee is to execute the trust, and, the property being so uncertain and indefinite, it may be conceived the testator meant to leave it entirely to the will and pleasure of the legatee, whether he would take upon himself that which is technically called a trust. Wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered are to be found in a will, not expressly creating trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended.

But the principle of those cases has never been held in this court applicable to a case where the testator himself has expressly said he gives his property upon trust. (If he gives upon trust, hereafter to be declared, it might perhaps originally have been as well to have held that, if he did not declare any trust, the person to whom the property was given should take it.) If he says he gives in trust and stops there, meaning to make a codicil or an addition to his will, or, where he gives upon trusts which fail, or are ineffectually expressed, in all those cases the court has said, if upon the face of the will there is declaration plain that the person to whom the property is given is to take it in trust; and, though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee; if not for those who were to take by the will, for those who take under the disposition of the law. It is impossible, therefore, to contend that, if this is a trust ineffectually expressed, the Bishop of Durham can hold for his own benefit. I do not advert to what appears upon the record of his intention to the contrary, and his disposition to make the application; for I must look only to the will, without any bias from the nature of the disposition, or the temper and quality of the person who is to execute the trust.

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[1] 2 Bro. C. C. 38, 226.

The next consideration is, whether this is a trust effectually declared; and, if not as to the whole, as to part. I put it so; as it is said, if the word "benevolence" means charity, and "liberality" means something different from that idea, which in a court of justice we are obliged to apply to that word "charity" (and, I admit, we are obliged to apply to it many senses not falling within its ordinary signification), there is a ground for an application in this case partially, if it cannot be wholly, to charity. It does not seem to me upon the authorities, particularly the Attorney General *v.* Whorwood,[1] that the argument for a proportionate division, or a division of some sort, would be displaced. I take the result of that case to be that the substratum of that charity failed, and all those partial dispositions that would have been good charity if not connected with that, failed together with it. It has been decided upon that principle, that, though money may be given to an infirmary or a school, yet, if that bequest is connected with a purpose of building an infirmary or school, and the money is then to be laid out upon it so built, the purpose, which is the foundation, failing, the superstructure must fail with it. The Attorney General *v.* Doyley[2] is almost the only case that has been cited for a proportional division. The testator expressly directed the trustees to dispose of his estate to such of his relations, of his mother's side, who were most deserving, and in such manner and proportions as they should think fit, to such charitable use as they should think most proper and convenient; and the court, which has taken strong liberties upon this subject of charity, though the manner and proportion were left to certain individuals, held that equality is equity, and there should be an equal division; but it is expressly declared that those who took were persons who could take under a bequest to charitable uses, and there was no difficulty in that case in saying, those words must be construed according to the habit and allowed authorities of the court.

The only case decided upon any principle that can govern this is Brown *v.* Yeall,[3] which applies strongly. I do not trust myself with the question whether the principle was well applied in that instance, but the decision furnishes a principle which the court must endeavor well to apply in cases that occur. I do not hesitate to say I entertain doubt, not of the principle upon which that case was decided, but whether it was well applied in that instance. Mr. Bradley was a very able lawyer, yet he mistook his way, as Serjeant Aspinall had not long before. Mr. Bradley gave a great portion of his fortune to accumulate for many years, and, meaning that it should be disposed of to charitable purposes, constituted a fund, expressly stating that his purpose was a charitable purpose, and confirming that by directing that charitable purpose to be carried on, as to the mode of executing it, by that court which, according to the constitution of the country, ordinarily administers property given to charitable uses. In his opinion, therefore, independent of particular authority, there was a principle, suggested by all other cases of trust, that if a trust was declared in such terms that this court could not execute it, that trust was ill declared, and must fail, for the benefit of the next of kin. The principle upon which that trust was ill declared is this. As it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust; a trust, therefore, which, in the case of maladministration, could be reformed, and a due administration directed, and then, unless the subject and the objects can be ascertained upon principles familiar in other cases, it must be decided that the court can neither reform maladministration nor direct a due administration. That is the principle of that case. Upon the question whether that principle was well applied in that instance, different minds will reason differently. I should have been disposed to say that, where such a purpose was expressed, it was not a strained construction to hold that the happiness of mankind intended was that which was to be promoted by the circulation of religious and virtuous learning; and, the testator having stated that to be the charitable purpose, which unquestionably was so, the distribution of books for the promotion of religion, the court might have so understood him; and the testator having not only called it a charitable purpose, but delegated the execution to this court, ought to be taken to have meant that.

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[1] 1 Ves. 534; Grieves *v.* Case, 1 Ves. 548 and n., 554.

[2] 4 Vin. 485; 2 Eq. Ca. Ab. 184. Stated from the Register's book, in the note, 7 Ves. 58.

[3] 7 Ves. 50, n.

Upon these grounds in a subsequent case, The Attorney General *v.* Stepney,[1] as to the Welch charities, it appeared to me too much, considering the Society in this country for the Propagation of the Gospel, &c., to say a trust for the circulation of bibles, prayer-books, and other religious books was not good. Then, looking back to the history of the law upon this subject, I say, with the Master of the Rolls, that a case has not been yet decided in which the court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general. Upon those cases in which the will devotes the property to charitable purposes, described, observation is unnecessary. With reference to those in which the court takes upon itself to say it is a disposition to charity, where in some the mode is left to individuals, in others individuals cannot select either the mode or the objects, but it falls upon the king, as *parens patriæ*, to apply the property, it is enough at this day to say, the court, by long habitual construction of those general words, has fixed the sense; and, where there is a gift to charity in general, whether it is to be executed by individuals selected by the testator himself, or the king, as *parens patriæ*, is to execute it, (and I allude to the case in Levinz, The Attorney General *v.* Matthews,[1]) it is the duty of such trustees on the one hand, and of the crown upon the other, to apply the money to charity in the sense which the determinations have affixed to that word in this court; viz. either such charitable purposes as are expressed in the statute (43 Eliz. c. 4), or to purposes having analogy to those. I believe the expression "charitable purposes," as used in this court, has been applied to many acts described in that statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is by the statute given to all the purposes described.

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[1] 10 Ves. 22.

The question, then, is entirely whether this is according to the intention a gift to purposes of charity in general as understood in this court; such that this court would have held the Bishop bound, and would have compelled him to apply the surplus to such charitable purposes as can be answered only in obedience to decrees where the gift is to charity in general; or is it, or may it be according to the intention, to such purposes, going beyond those partially or altogether which the court understands by "charitable purposes"; and, if that is the intention, is the gift too indefinite to create an effectual trust to be here executed? The argument has not denied, nor is it necessary, in order to support this decree, that the person created the trustee might give the property to such charitable uses as this court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary, to support this decree, to contend, that the trustee might not consistently with the intention have devoted every shilling to uses in that sense charitable, and of course a part of the property. But the true question is, whether, if upon the one hand he might have devoted the whole to purposes in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes as this court construes those words; and, if according to the intention it was competent to him to do so, I do not apprehend that under any authority upon such words the court could have charged him with maladministration, if he had applied the whole to purposes, which, according to the meaning of the testator, are benevolent and liberal, though not acts of that species of benevolence and liberality which this court in the construction of a will calls charitable acts.

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[1] 2 Lev. 167.

The question, therefore, resolves itself entirely into that; for I agree there is no magic in words, and if the real meaning of these words is charity or charitable purposes, according to the technical sense in which those words are used in this court, all the consequences follow; if, on the other hand, the intention was to describe anything beyond that, then the testator meant to repose in the Bishop a discretion, not to apply the property for his own benefit, but that would enable him to apply it to purposes more indefinite than those to which we must look, considering them purposes creating a trust; for, if there is as much of indefinite nature in the purposes intended to be expressed, as in the cases to which I first alluded, where the objects are too uncertain to make recommendation amount to trust by analogy, the trust is as ineffectual, — the only difference being, that in the one case no trust is declared, and the recommendation fails, the objects being too indefinite; in the other the testator has expressly said it is a trust, and the trustee consequently takes, not for his own benefit, but for purposes not sufficiently defined to be controlled and managed by this court. Upon these words much criticism may be used. But the question is, whether, according to the ordinary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word "charity," in the Christian religion, this testatrix meant by these words to confine the defendant to such acts of charity or charitable purposes as this court would have enforced by decree, and reference to a master. I do not think that was the intention; and, if not, the intention is too indefinite to create a trust. But it was the intention to create a trust, and the object being too indefinite has failed. The consequence of law is, that the Bishop takes the property upon trust to dispose of it as the law will dispose of it, not for his own benefit or any purpose this court can effectuate. I think, therefore, this decree is right. *The decree was affirmed.*[1]

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[1] James *v.* Allen, 3 Mer. 17 (*semble*); Ommaney *v.* Butcher, T. & R. 260; Fowler *v.* Garlike, 1 Russ. & M. 232; Williams *v.* Kershaw, 5 Cl. & F. 111 (*semble*); Harris *v.* Du Pasquier, 26 L. T. Rep. 689; Leavers *v.* Clayton, 8 Ch. D. 589; Adye *v.* Smith, 44 Conn. 60; Taylor *v.* Keep, 2 Bradw. 368; Chamberlain *v.* Stearns, 111 Mass. 267; Nichols *v.* Allen, 130 Mass. 211 *Accord.*

In a few of our States trusts for charity, where the property is not given to a charitable corporation duly authorized to administer the trust, must be as specific in regard to the beneficiary as private trusts. In these States, too, the doctrine of Morice *v.* Bishop of Durham has been recognized, with the lamentable result that the court will not permit a willing trustee to carry out the beneficent purpose of the testator. Hughes *v.* Dailey, 49 Conn. 34; Gambel *v.* Trippe (Md., 1892), 23 Atl. R. 461; Methodist Church *v.* Clark, 41 Mich. 730; Little *v.* Wilford, 31 Minn. 173; Altvater *v.* Russell (Minn., 1892), 51 N. W. R. 629; Holland *v.* Alcock, 108 N. Y. 312; O'Connor *v.* Gifford, 117 N. Y. 275; Reed *v.* Williams, 125 N. Y. 560; Tilden *v.* Green, 00 N. Y. 000; Butler *v.* Green, 16 N. Y. Sup. 889; Stonestreet *v.* Doyle, 75 Va. 356; Bible Society *v.* Pendleton, 7 W. Va. 79.

For a criticism of these decisions, see 5 Harv. L. Rev. 389-402. — ED.

MUSSETT *v.* BINGLE.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, BEFORE SIR CHARLES HALL, V. C., MAY 10, 1876.

[*Reported in Week'y Notes* (1876), 170.]

IN this cause, which now came on upon further consideration, the testator had by his will directed his executors to apply £300 in erecting a monument to his wife's first husband, and also to invest £200 and apply the interest in keeping up the monument. It was admitted that the latter direction was bad,[2] and the question argued was whether the former direction was good.

The trustees were ready to carry out the testator's wishes, but some of the beneficiaries contended that the first direction was void as purely "honorary."

Dickinson, Q. C., and *Cozens-Hardy*, for the plaintiff.

W. Pearson, Q. C., and *Bathurst*, for the executors.

Badcock, for the heir at law.

W. W. Cooper and *Kekewich*, for other persons interested.

THE VICE CHANCELLOR said that the direction to the executors was a perfectly good one, and one which they were ready to perform, and it must be performed accordingly.[1]

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[1] Lloyd *v.* Lloyd, 2 Sim. N. S. 255, 265; Rickard *v.* Robson, 31 Beav. 244; Fowler *v.* Fowler, 33 Beav. 616; Hoare *v.* Osborne, L. R. 1 Eq. 585; *Re* Rigley's Trust, 36 L. J. Ch. 147; Yeap Cheah Neo *v.* Ong Cheng Neo, L. R. 6 P. C. 381, 396; Fiske *v.* Att'y. Gen., 4 Eq. 521; Hunter *v.* Bullock, 14 Eq. 45; Dawson *v.* Small, 18 Eq. 114; *Re* Williams, 5 Ch. D. 735; *Re* Birkett, 9 Ch. D. 576; *Re* Vaughan, 33 Ch. D. 187; Beresford *v.* Jervis, 11 Ir. L. T. Rep. 128; *Re* Sinclair's Trusts, 13 L. R. Ir. 150; Johnson *v.* Holifield, 79 Ala. 423; Coit *v.* Comstock, 51 Conn. 352; Piper *v.* Moulton, 72 Me. 155; Church Extension *v.* Smith, 56 Md. 364; Dexter *v.* Gardner, 7 All. 243 (*semble*); Giles *v.* Boston Society, 10 All. 355, 357 (*semble*); Bates *v.* Bates, 134 Mass. 110; Detwiller *v.* Hartman, 37 N. J. Eq. 347; Read *v.* Williams, 125 N. Y. 560; *Re* Fisher's Estate, 8 N. Y. Supp. 10; Trustees *v.* Gifford, 5 Pa. Co. R. 92; Kelly *v.* Nichols (R. I., 1891), 21 Atl. R. 906; Hornberger *v.* Hornberger, 12 Heisk. 635; Fite *v.* Beasley, 12 Lea, 328 *Accord.*

The decisions to the contrary in Gravenor *v.* Hallum, Amb. 643, Jones *v.* Mitchell, 1 S. & S. 290, and Willis *v.* Brown, 2 Jur. 987, must be regarded as overruled. A similar decision in Jones *v.* Habersham, 107 U. S. 174, 3 Woods C. C. 443, 470, is due to a statute.

If no perpetuity is attempted, e. g. where property is given in trust for the maintenance of a monument during the life of A., the trustee cannot be prevented from effectuating the donor's purpose. Lloyd *v.* Lloyd, 2 Sim. N. S. 255 (*semble*).

The rule of perpetuities was ingeniously evaded in *Re* Tyler (1891), 3 Ch. 252. The testator gave a fund to a charitable organization, with directions to maintain the family vault. If these directions were not complied with, the fund was to go to another charity. The condition and the gift over were held valid. — ED.

[2] Masters *v.* Masters, 1 P. Wms. 423; Mellick *v.* Asylum, Jacob, 180 (*semble*); Limbrey *v.* Gurr, 6 Mad. 151; Adnam *v.* Cole, 6 Beav. 353; Trimmer *v.* Danby, 25 L. J. Ch. 424; Gilmer *v.* Gilmer, 42 Ala. 9; Johnson *v.* Holifield, 79 Ala. 423, 424

GOTT v. NAIRNE.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, BEFORE SIR CHARLES HALL, V. C., MAY 17, 1876.

[*Reported in* 35 *Law Times Reporter*, 209.[1]]

DEMURRER. William Gott, by a codicil to his will, bequeathed to R. Nairne and T. W. Nelson the sum of £12,000, upon trust that they or the survivor of them, or the executors or administrators of such survivor, should, as soon as conveniently might be after the testator's decease, but nevertheless at their sole and absolute discretion, invest the whole or such part as they should think fit of the said sum of £12,000 in the purchase of an advowson and right of patronage of, in, and to some ecclesiastical benefice in England, with the right of next presentation thereto. And the testator directed that until his son John Gott should be duly presented to and inducted into some ecclesiastical benefice which should produce a net annual income of £1,000 at the least (after deducting the necessary charges and outgoings in respect thereof), or should previously depart this life, the trustees should nominate to the said ecclesiastical benefice, when and so often as any vacancy should occur, such fit and proper person as they might in their uncontrolled discretion select or choose for that purpose. Subject as aforesaid, the trustees were to stand possessed of the advowson and right of presentation in trust for John Gott, his heirs and assigns. The testator also directed that until the £12,000, or such part of it as the trustees should think fit, had been invested as aforesaid, they should invest it in specified securities, and for the term of twenty-one years from the date of his death accumulate it and the income thereof, by way of compound interest. And he declared that such accumulated fund should be applicable to the purchase of the advowson, and that the interest of the £12,000 and the accumulations thereof, together with the securities in which they might be invested at the expiration of the twenty-one years, should, so far as they had not been laid out in the purchase of the advowson, belong and be paid to John Gott, his executors or administrators. Provided, however, that if John Gott should die or be inducted into some ecclesiastical benefice of the annual value aforesaid before the trustees had entered into any contract

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(*semble*); Cleland v. Waters, 19 Ga. 35, 54, 61 (*semble*); Detwiller v. Hartman, 37 N. J. Eq. 347 ($40,000 monument); Wood v. Vandenburgh, 6 Paige, 277; Hagenmeyer v. Hanselman, 2 Dem. 87, 88 (*semble*); *Re* Frazer, 92 N. Y. 239 (repair of cemetery lot); Emans v. Hickman, 12 Hun, 425 (but see *Re* Fisher's Estate, 8 N. Y. Supp. 10); Bainbridge's App., 97 Pa. 482; Fite v. Beasley, 12 Lea, 328; Cannon v. Apperson, 14 Lea, 553, 590.

See Mitford v. Reynolds, 1 Ph. 185, 16 Sim. 109, 1 Ph. 706; Ford v. Ford (Ky.), 16 S. W. R. 451; Bates v. Bates, 134 Mass. 110. — ED.

[1] s. c. 3 Ch. D. 278. — ED.

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for the purchase of an advowson, or if any part of the £12,000, or the accumulations thereof, should remain undisposed of after completing such contract, then the £12,000 and the accumulations thereof, or so much of the same as should remain undisposed of, should belong and be paid to John Gott, his executors or administrators.

The testator died in 1863. The trustees had received the £12,000 and invested it and the accumulations as directed, but no purchase of an advowson had been made.

John Gott, the son, had been presented to the vicarage of Leeds, and it was in dispute between the trustees and himself whether or not the benefice was worth a clear £1,000 a year.

The action was brought by John Gott against the trustees.

The statement of claims set out the above mentioned facts, but claimed to have the trust fund handed over to the plaintiff, irrespective of any question as to value of his present living.

The defendants demurred generally.

G. Hastings, Q. C., and *Kekewich*, for the demurrer. The defendants do not decline to carry out the trust created by this will. The plaintiff, therefore, cannot claim this fund, unless he can show that he is the exclusive object of the trust. But it is clear that the trustees may, at any time until the expiration of twenty-one years from the testator's death, create a *cestui que trust* by purchasing an advowson and presenting some person other than the plaintiff to it. The case is like that of Mussett *v.* Bingle, where a bequest to erect a tombstone was upheld, the trustees being willing to carry it out. They cited Harbin *v.* Masterman,[1] and Talbot *v.* Jevers.[2]

Dickinson, Q. C., and *Ingle Joyce*, for the plaintiff. Both the fund and the advowson belong to the plaintiff, subject to the direction to accumulate the interest on the fund and the purchase of and presentation to an advowson. As to the accumulation, it is clear that where there is a simple direction to accumulate a fund and give it to A. twenty-one years hence, he, if of full age, is entitled to receive it at once. As to the purchase of the advowson, there are a series of cases of which Gosling *v.* Gosling[3] is the most important, showing that the legatee in such a case is entitled to have the fund at once, unless the testator has shown a clear intention that some one shall have the enjoyment of it in the mean time. Here the testator's object was evidently to benefit the plaintiff alone, it being clear that there was no other person whom he specially wished to benefit. There is no trust for any person except the plaintiff, no person who now or at any time can call upon the trustees to purchase a living. Harbin *v.* Masterman[1] is in our favor, for there the Vice Chancellor would have divided the fund amongst the residuary legatees, had they not been charities. They cited also Thomson *v.* Shakespeare;[4] Lewin on Trusts, 6th edit. 94.

G. Hastings, Q. C., replied.

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[1] 25 L. T. Rep. N. S. 200; L. Rep. 12 Eq. 559.

[2] L. Rep. 20 Eq. 255.

[3] John. 265.

[4] John. 612; 1 DeG. F. & J.

whether it paid 1000. But he thought it
ought to be turned over to him anyhow.
[illegible]
Held; the trust should be carried out.

The Vice Chancellor. In this case the trustees disclaim any beneficial interest in the fund in question, but do not say that they are unwilling to perform the trust. They do not look upon this trust as beneficial to themselves, but — there being something to be done, perfectly legal — the trustees are desirous to do it. The plaintiff, then, not having shown that the trusts are simply and solely for his benefit, and such as he has a right to put an end to, the demurrer must be allowed. I see no reason why the trustees should not be allowed to carry out this trust. And it is to be observed, that they are to nominate to the benefice, when purchased, "when and so often as any vacancy shall occur." So that even if they purchased an advowson and presented the plaintiff himself to it, that would not at once put an end to their trust. Moreover, it does not follow that the whole fund would be expended in purchasing the advowson. The demurrer must, consequently, be allowed; but the plaintiff will have leave to amend, and thus raise the question of the net value of his present benefice.

BROWN v. BURDETT.

IN CHANCERY, BEFORE BACON, V. C., AUGUST 2, 1882.

[*Reported in Weekly Notes* (1882), 134.[1]]

Testatrix by a codicil, dated the 26th of September, 1868, to her will (dated the 22d of May, 1868), revoked a devise of a messuage, garden, orchard, and outbuildings at Gilmorton, Leicestershire, and gave and devised the same, and the furniture therein, to three trustees upon trust, immediately after her funeral, and upon the same day, to cause the windows and doors of each room in the house (except the kitchen, back kitchen, middle attic, and hall), and of the coach-house, to be well and effectually bricked up from the outside, with every article of whatever kind that might be therein (including testatrix's clock), and cause the same to be repaired and renewed as occasion should require, and so bricked up to continue for the term of twenty years next after her decease; and subject to the trusts aforesaid, upon trust, to place in and remove at pleasure some respectable married couple in the occupation of the rooms excepted as above, and allow them to live therein, and occupy the same place and premises rent free, in consideration of their taking care of the messuage and premises, and particually the blockade to the doors and windows, and to see that the same were in no wise tampered or meddled with. From and after the expiration of the term of twenty years, testatrix devised the house and premises to a devisee for life, with remainder to another

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[1] 21 Ch. D. 667, s. c. — Ed.

Testatrix devised her house and land to trustee upon trust that they would close up part of house for 20 & let the balance to a married couple in consideration of their

given to one for life, remainder to another in f
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person in fee. By another codicil, dated the 22d of May, 1871, testatrix gave a number of other minute directions as to how the outside and inside doors, windows, and chimney tops were to be blocked up and covered in; and directed that the married couple should pay a nominal rent of one halfpenny a week.

Testatrix died on the 16th of January, 1872.

Miller, Q. C., and *Brett*, for the plaintiff, submitted that this was a lawful limitation.

Marten, Q. C., and *S. Hall*, for a defendant, argued that the devise as to the twenty years' term was inoperative and void.

E. K. Karslake, Q. C., *M. R. Phillips*, *Hemming*, Q. C., *L. Yate Lee*, and *A. G. Langley*, for other parties.

THE VICE CHANCELLOR held that there was an intestacy as to the term of twenty years in the house, garden, outbuildings, and furniture.[1]

IN RE DEAN. COOPER-DEAN *v.* STEVENS.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, MARCH 30, APRIL 4, 9, 1889.

[*Reported in* 41 *Chancery Division Reports*, 552.]

WILLIAM CLAPCOTT DEAN, by his will dated the 12th of November, 1887, devised all his freehold estates, subject to and charged with certain annuities, and with an annuity of £750 thereinafter mentioned to his trustees, and to a term of fifty years thereinafter granted to his trustees, to the use of his trustees, for the term of one year from the day preceding his death, upon certain trusts, and, subject thereto, to the use of James Cooper (the plaintiff) for his life, with remainder to the use of the plaintiff's first and other sons, successively in tail male, with remainders over. The will continued: "I give to my trustees my eight horses and ponies (excluding cart horses) at Littledown, and also my hounds in the kennels there. And I charge my said freehold estates hereinbefore demised and devised, in priority to all other charges created by this my will, with the payment to my trustees for the term of fifty years commencing from my death, if any of the said horses and hounds shall so long live, of an annual sum of £750. And I declare that my trustees shall apply the said annual sum payable to them under this clause in the maintenance of the said horses and hounds for the time being living, and in maintaining the stables, kennels, and buildings now inhabited by the said animals in such condition of repair as my trustees may deem fit; but this condition shall not imply any obligation on my trustees to leave the said stables, kennels, and buildings in a state of repair at the determination of the said term; but I declare that my trustees shall not be bound to render any account of the application or expenditure of the said sum of £750, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion." . . .[1]

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[1] A devise to a tenant in tail upon trust not to bar the entail does not create a trust. Dawkins *v.* Perrhyn, 4 App. Cas. 51. — ED.

The testator died on the 3d of December, 1887. This was an originating summons by James Cooper, who had assumed the name of Dean, as plaintiff, against the trustees of the will, asking a declaration that the gift of the £750 a year to the defendants for the purposes mentioned in the will was invalid, or, in the alternative, a declaration that the plaintiff was entitled under the trusts of the will to the balance from time to time in any year, commencing from the testator's death, of the £750, after making provision for the maintenance of the testator's horses, hounds, stables, kennels, and buildings mentioned in his will.

Cozens-Hardy, Q. C., and *Vernon R. Smith*, for the plaintiff.

Everitt, Q. C., and *Alexander*, for the trustees of the will.

North, J. The first question is as to the validity of the provision made by the testator in favor of his horses and dogs. It is said that it is not valid; because (for this is the principal ground upon which it is put) neither a horse nor a dog could enforce the trust; and there is no person who could enforce it. It is obviously not a charity, because it is intended for the benefit of the particular animals mentioned, and not for the benefit of animals generally, and it is quite distinguishable from the gift made in a subsequent part of the will to the Royal Society for the Prevention of Cruelty to Animals, which may well be a charity. In my opinion this provision for the particular horses and hounds referred to in the will is not, in any sense, a charity, and, if it were, of course the whole gift would fail, because it is a gift of an annuity arising out of land alone. But, in my opinion, as it is not a charity, there is nothing in the fact that the annuity arises out of land to prevent its being a good gift.

Then it is said, that there is no *cestui que trust* who can enforce the trust, and that the Court will not recognize a trust unless it is capable of being enforced by some one. I do not assent to that view. There is not the least doubt that a man may, if he pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid, although it is difficult to say who would be the *cestui que trust* of the monument. In the same way, I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same to keeping that monument in repair, say for ten years, is, in my opinion, a perfectly good trust, although I do not see who could ask the Court to enforce it. If persons beneficially interested in the estate could do so, then the present plaintiff can do so; but if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively enforce it.

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[1] The statement of facts has been curtailed, and the arguments of counsel are omitted. — Ed.

Is there then anything illegal or obnoxious to the law in the nature of the provision, that is, in the fact that it is not for human beings, but for horses and dogs? It is clearly settled by authority that a charity may be established for the benefit of horses and dogs, and therefore the making of a provision for horses and dogs, which is not a charity, cannot of itself be obnoxious to the law, provided, of course, that it is not to last for too long a period. Then there is what I consider an express authority upon this point in Mitford *v.* Reynolds.[1]

It is impossible to suppose that, from the beginning to the end of these proceedings, the question whether the gift was good or bad was never brought to the attention of all the learned judges before whom the case came. I do not indeed find that any formal discussion took place upon it. This may have been because all the parties agreed upon the point, or it may have been disposed of by the judge in the course of the argument. But it is impossible to suppose that the matter was not fully present to the learned counsel who argued the case, or to the various judges before whom it came, and that they did not treat the gift as valid. The point must have been raised, because the fund out of which it was to take effect (if it were good) was given to a charity. It was the duty of the counsel for the Governor General and the East Indian Government to raise the point on behalf of the charity, if there was anything in it, because the charity would have taken so much more, if the provision for the horses were invalid. That being so, I think I may treat that case as a decision by very high authority that such a provision is good, and, if I had felt any doubt about the point myself, I should have considered that authority as settling it, so far as I am concerned. There is nothing, therefore, in my opinion, to make the provision for the testator's horses and dogs void.

Then the next question is this: the gift is of an annuity of £750, during the lives and life (to put it shortly) of the horses and dogs, and the survivors or survivor of them, and of course a time would arrive when the provision which the testator thought right to make for all the animals would be much more than sufficient for the three or the two or the one which might survive. The annuity is to cease entirely when the last survivor dies, and it is obvious that nothing like that sum could or would be applied for the benefit of the animals when they became greatly reduced in number. The question is, whether the annuity was given to the trustees beneficially. In my opinion it was not given to them beneficially. They are from beginning to end called "the trustees," and beyond all question the principal trust to be discharged by them under the will is that relating to the horses and dogs. There was, no doubt, the management trust, and that was a serious trust while it lasted, but it came to an end at the close of a year after the testator's death. These persons are described throughout as "trustees," and the annuity is given to them as trustees, and in my opinion they took it only as trustees, for the purpose of giving effect to the trust declared of it, and they did not themselves take any beneficial interest in it. The trust is for payment to the trustees. Then there is a declaration that the trustees shall apply the annual sum payable to them in the maintenance of the horses and dogs. They have a discretion as to the repair of the buildings, but they are not under any obligation to leave the buildings in a state of repair at the end of the term. Then come the words: "Any part thereof remaining unapplied shall be dealt with by them at their sole discretion." If the testator had meant them to take beneficially, it would have been very easy to say that "any surplus, after satisfying the aforesaid purposes, shall be divided among them for their own use." But the testator does nothing of that sort. He treats them as having a joint interest. The annuity is to be applied by them, it is to be subject to a discretion to be exercised by them, and, in my opinion, looking at the whole of the will, it was not intended to vest the annuity in them beneficially, but only to give them a discretion with respect to it as trustees. I have omitted to read these words, which form part of the sentence: "I declare that my trustees shall not be bound to render any account of the application or expenditure of the said sum of £750, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion." In my opinion the testator intended by these words to give them complete latitude as to the keeping up of the stables and kennels for the horses and dogs, and as to the provision to be made for them; in other words, he intended that it should not be open to any one to say that the trustees had spent more than was reasonable for the purpose, or that the animals could have been very well maintained for a much less sum than had been actually spent upon them, and that the trustees must account for the surplus on that footing. In my opinion he intended to give them an absolute discretion as to how much of the annuity was to be applied in that way. His object was to make them absolute masters of the application of the money for the benefit of the horses and dogs, without their being liable to account for having spent more than a reasonable sum upon that object.

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[1] The learned judge here stated at length the proceedings in Mitford *v.* Reynolds. — ED.

Then the final words of the will throw great light upon the testator's intention. It must be remembered that the trust is to come to an end when the last surviving horse or dog has died. It is clear, therefore, that he was considering the benefit of the animals which are the object of the trust, and, *prima facie*, it was not his intention to benefit the trustees, as distinguished from the animals which they were to maintain, and the final words, I think, show this very clearly. It is clear that he was not leaving to the trustees a discretion as to the way in which they were to deal with the animals, but he was himself giving directions as to what was to be done about them, and lastly, if a time should arrive at which the trustees should think that any of them should be killed, he gives specific directions as to the mode by which that end is to be accomplished, thus showing that he was giving directions which they were bound to follow, and not merely giving them an absolute discretion to apply the money to those purposes or to any other purposes they pleased. Then, coming to the final words of the will, why does he give his personal estate not otherwise disposed of to the tenant for life of the real estate? For this reason: "In consideration of the maintenance of my horses, ponies, and hounds being a charge upon my said estates as aforesaid." Not in consideration of there being this charge of £750 a year on the estates, but in consideration of the maintenance of the animals being a charge upon the estates. I have no doubt he was expressing his intention that the charge was to be for carrying out that purpose, and that he did not intend to confer any benefit upon the trustees.

I think it is not necessary to comment upon the cases which have been cited on this point, for there is no conflict between them; the only question is within which class of them the present case falls. In my opinion, upon this will, especially having regard to the last clause, it is clear that the testator is only making a provision for the maintenance of the animals, and that he does not intend to confer any benefit on the trustees.

I must, therefore, declare that the trustees do not take the surplus beneficially, but, upon the question whether the surplus belongs to the heir at law or to the devisee of the real estate, by reason of its not being raisable out of the estate, I say nothing in the absence of the heir at law.[1]

REICHENBACH *v.* QUIN.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, IRELAND, BEFORE THE RIGHT HON. HEDGES E. CHATTERTON, V. C., FEBRUARY 9, 16, 1888.

[*Reported in* 21 *Law Reports, Irish,* 138.]

JANE COWLEY, by her will, dated the 30th October, 1881, devised and bequeathed all her property to the defendants, upon the trusts therein declared; and, after giving certain other directions in respect thereof, proceeded: "And whatever interest I have in the lands of Newcastle, County Dublin, and in the premises in Bridgefoot Street, Dublin, now forming a portion of Darcy's Brewery, I direct that the same shall be sold after my decease, if not previously disposed of, and out of the amount realized thereby, after payment of the expenses of such sale, I direct my trustees to apply £100 towards having masses offered up in public in Ireland for the repose of my soul and the souls of my father, mother, brother, and sisters, and of my servant Anne Hagarty, and apply the balance towards such charitable purposes in Ireland as my trustees shall select." And the testatrix appointed the defendants executors of her said will.

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[1] Mitford *v.* Reynolds, 16 Sim. 105; Fable *v.* Brown, 2 Hill, Ch. 378, 382 (*semble*); Skrine *v.* Walker, 3 Rich. Eq. 262, 269 (*semble*) *Accord.* — ED.

The testatrix died on the 16th June, 1882, and on the 24th July, 1882, probate of her will was granted to the defendants.

Anne Hagarty survived the testatrix.

An action was brought by certain legatees under the said will, for the purpose of having the trusts thereof carried out and the personal estate of the testatrix administered, and a decree was, on the 4th March, 1885, made to that effect.

The case now came before the Court on further consideration of the Chief Clerk's certificate, and a question arose as to the validity of the bequest for masses.

Serjeant Campion (with him *Mr. Harty*), for the plaintiffs.

Mr. Bewley, Q. C. (with him *Mr. J. H. Campbell*), for the defendants.

Mr. Carson, for the Attorney General.[1]

THE VICE CHANCELLOR. I am of opinion that there is no attempt to create a perpetuity by the trust in reference to the £100 for masses. There is a direction in the will that the lands of Newcastle and the testatrix's premises in Bridgefoot Street should be sold, and that out of the amount realized her trustees should apply £100 towards having masses offered up in public in Ireland for the repose of her soul and the souls of the other persons mentioned.

I do not consider that there is any attempt here to create a perpetuity, and on that ground — and I wish it to be understood that on that point only I give a decision — I shall declare that the gift is valid.[2]

doubtful

as charity valid i.e. enforced as such.

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[1] The arguments of counsel are omitted. — ED.

[2] Commissioners *v.* Wybrants, 7 Ir. Eq. 34 n.; Read *v.* Hodgens, 7 Ir. Eq. 16; Raftery *v.* Coleman, Hamilton, Charities, (2d ed.) 77, L. R. 21 Ir. 139 (cited); Brennan *v.* Brennan, Ir. R. 2 Eq. 321; Dillon *v.* Reilly, Ir. R. 10 Eq. 152 (third point); Atty. Gen. *v.* Delaney, Ir. R. 10 C. L. 104; Bradshaw *v.* Jackman, 21 L. R. Ir. 12; Perry *v.* Tuomey, 21 L. R. Ir. 480; Hagenmeyer *v.* Hanselman, 2 Dem. 87 *Accord.*

Boyle *v.* Boyle, Ir. R. 11 Eq. 433 (*semble*); Holland *v.* Alcock, 108 N. Y. 312; O'Conner *v.* Gifford, 117 N. Y. 275, 280 (*semble*), 6 Dem. 71 *Contra.* In Holland *v.* Alcock, *supra*, Rapallo, J., on behalf of the Court, said, pp. 322–324: "It has been argued that the absence of a beneficiary entitled to enforce the trust is not fatal to its existence where the trustee is competent and willing to execute it, and the purpose is lawful and definite; that it is only where the trustee resists the enforcement of the trust, that the question of the existence of a beneficiary entitled to enforce it arises. I have not found any case in which this question has been adjudicated, or the point has been made, and it does not seem to be presented on this appeal. The case now before us arises on a demurrer by the defendant Alcock, one of the executors, to the complaint, on the ground that it shows no right in the plaintiffs. The complaint alleges that the defendant Alcock, together with Frederick Smyth, were named as executors in the will; that the defendant Alcock did not qualify, and has never acted as executor or as trustee of the alleged trust sought to be created by the third clause, nor participated in any form in carrying out the same, but that his co-executor Frederick Smyth has taken possession of the whole estate as such executor and trustee. Smyth is not a party to this appeal. It comes up on the demurrer of Alcock alone, and there is nothing in the complaint to show that he is willing to execute the trust, but on the contrary it shows that he has in no manner acted or qualified himself to act therein. But aside from these considerations, I do not think that the validity or invalidity of the trust can depend upon the will of the trustee. If the trust is valid he can be compelled to execute it; if invalid he stands, as to personal property undisposed of by the will, as trustee for the next of kin, and the equitable interest is vested in them immediately on the death of the testator, subject only to the payment of his debts and the expenses of administration. When a trust is attempted to be created without any beneficiary entitled to demand its enforcement, the trustee would, if the trust property were in his possession, have the power to hold it to his own use without accountability to any one and contrary to the intention of the donor, but for the principle that in such a case a resulting trust attaches in favor of whoever would but for the alleged trust be equitably entitled to the property. This equitable title cannot on any sound principle be made to depend upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. In such a case there is no trust in the sense in which the term is used in jurisprudence. There is simply an honorary and imperfect obligation to carry out the wishes of the donor, which the alleged trustee cannot be compelled to perform, and which he has no right to perform contrary to the wishes of those legally or equitably entitled to the property, or who have succeeded to the title of the original donor. The existence of a valid trust capable of enforcement is consequently essential to enable one claiming to hold as trustee to withhold the property from the legal representatives of the alleged donor. A merely nominal trust, in the performance of which no ascertainable person has any interest, and which is to be performed or not as the person to whom the money is given thinks fit, has never been held to be sufficient for that purpose."

A conveyance *inter vivos*, upon trust for masses for the soul of the donor is valid: Kehoe *v.* Kehoe (Cook Co. C. C., Ill.), 22 A. L. Reg. N. S. 656; even in New York, where a bequest for the same purpose is inoperative: Gilman *v.* McArdle, 99 N. Y. 451. 88 Me

If the bequest for masses contemplates a perpetuity, it is of course void, inasmuch as it is not a charitable bequest. Dillon *v.* Reilly, Ir. R. 10 Eq. 152; Beresford *v.* Jervis, 11 Ir. L. T. Rep. 128; M'Court *v.* Burnett, 11 Ir. L. T. Rep. 130; Kehoe *v.* Wilson, 7 L. R. Ir. 10; Morrow *v.* M'Conville, 11 L. R. Ir. 236; Dorrian *v.* Gilmore, 15 L. R. Ir. 69. In Massachusetts and Pennsylvania, however, such a bequest is a charitable bequest. Schouler, Pet., 134 Mass. 426; Seibert's App., 18 W. N. (Pa.) 276; Power's Estate, 5 W. N. (Pa.) 59 (reversed on another ground in Rhymer's App., 93 Pa. 142); Dougherty's Estate, 5 W. N. (Pa.) 556 (*semble*). 86 N. E. 568.; 1897 1 Irish 426 – overrul Municipal

– Extende in other ju dictions

In England a trust for masses is void as a superstitious use. Rex *v.* Portington, 1 Salk. 162; West *v.* Shuttleworth, 2 M. & K. 684; Heath *v.* Chapman, 2 Drew. 417; *Re* Blundell, 30 Beav. 360; *Re* Fleetwood, 15 Ch. D. 596; Elliott *v.* Elliott, 35 Sol. J. 206. — ED.

ROSS AND ROSS v. DUNCAN AND OTHERS.

IN THE SUPERIOR COURT OF CHANCERY, MISSISSIPPI, BEFORE ROBERT J. BUCKNER, CHANCELLOR, 1839.

[*Reported in Freeman, Chancery,* 587.]

THE CHANCELLOR.[1] The complainants bring this suit as the heirs and distributees of Margaret A. Reed, deceased. The allegations of the bill, so far as the demurrer is concerned, are:

That Mrs. Reed, about the 14th June, 1838, made her last will and testament, appointing the defendants her executors, to whom she devised and bequeathed the most of her estate, consisting in part of a large number of negro slaves; that said devises and bequests were made upon the secret trust and confidence that the negroes should be taken by the defendants as the executors of the will to Liberia, there to remain free, &c. A letter from the testatrix of even date with the will is referred to in the bill, which it is alleged is declarative and expressive of the secret trust aforesaid. It is alleged that this secret trust is in violation of the laws of Mississippi, and was intended to evade and defraud the statute which prohibits the emancipation of slaves by last will and testament, except under the restrictions therein enumerated. The complainants pray that the will be set aside, that the estate may be decreed to them, &c. To this bill there is a general demurrer, which at once presents the question of the validity of the will as coupled with the alleged secret trust. If the trust be an illegal one, it can make no difference whether it be tacit or express; the same consequences must follow it in either character. I shall therefore elect to consider the will as having upon its face a devise and bequest to the defendants upon the express trust that the negroes therein mentioned should be taken to Liberia, there to remain free. Several collateral questions were made on the argument, all of which it is believed resolve themselves into this plain and broad proposition: Is a will made within this State, by one of its citizens, in which negro slaves are bequeathed upon the trust that they shall be taken to Liberia, on the coast of Africa, there to remain, void, as being in fraud and violation of our laws, and in contravention of their policy upon the subject of domestic slavery?

It is difficult to conceive how an act done in Liberia, according to its laws, should involve a violation of those of this State. The rule that every contract, act, or agreement is to be governed by the laws of the place where the execution or peformance is to take place, is one of universal application. The execution of the trust in this case, according to the allegations of the bill, is to take place in Liberia. The laws of that place, then, according to the rule, must decide upon its legality. The ground was taken, that, as the negroes, for whose benefit the trust was raised, can maintain no suit in our courts to enforce it, and there being no one who can enforce it, the trust, it is insisted, is therefore void. The conclusion does not necessarily follow from the premises. A trust may be created which may be perfectly consistent with the law, and yet the law may have pointed out no mode of enforcement; still it would not interpose to prevent it, but would leave its execution to the voluntary action of the trustee. A person may convey his property upon what trust or condition he pleases, so that it be not against law; and the court would only interfere at the instance of the heirs or distributees of the grantor or testator, when there had been a failure or refusal to perform the condition or trust. These principles, I think, are plainly deducible from the case in 4 Wheaton, 35.

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[1] The report of the case is materially abridged. — ED.

The demurrer must be sustained and the bill dismissed.[1]

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[1] Affirmed in the High Court of Errors and Appeals, 6 Miss. 305. See, to the same effect, Atwood *v.* Beck, 21 Ala. 590; Abercrombie *v.* Abercrombie, 27 Ala. 489; Hooper *v.* Hooper, 32 Ala. 669; Jordan *v.* Bradley, Dudley (Ga.), 170; Vance *v.* Crawford, 4 Ga. 445; Cooper *v.* Blakey, 10 Ga. 263; Cleland *v.* Waters, 19 Ga. 35, 53–54, 61–62; Sanders *v.* Ward, 25 Ga. 109; Green *v.* Anderson, 38 Ga. 655; Leech *v.* Cooley, 14 Miss. 93; Thompson *v.* Newlin, 6 Ired. 380, 8 Ired. 32; Frazier *v.* Frazier, 2 Hill, Ch. 304 (but in 1841 a statute was passed making such trusts illegal as against public policy Finley *v.* Hunter, 2 Strob. Eq. 208, 214; Gordon *v.* Blackman, 1 Rich Eq. 61); Henry *v.* Hogan, 4 Humph. 208; Elder *v.* Elder, 4 Leigh, 252.

In Cleland *v.* Waters, *supra*, Starnes, J., says, p. 61: "The executor's right and duty in the premises are prescribed by the law of the testator's will. Where there is no municipal law forbidding it, the testator can certainly make such a law for himself in his will, and the same reason exists why the executor should carry it into effect, as why he should erect a monument or tombstone of specified character and cost, if so directed by the testator's will. It will not be disputed, I suppose, that, if such directions were given by a testator, it would be the duty of his executor to carry them into effect (especially if they were reasonable), and that he would be sustained by a court of justice in so doing, or instructed so to do by a court of equity, if he asked instructions on this head. Yet, it could not be said that the tombstone had any right in the premises, or, perhaps, that any remedy lay against the executors by which the erection of the stone could be enforced." In Hooper *v.* Hooper, *supra*, Rivers, C. J. said, p. 673: "The Court of Chancery will recognize the *authority* of the executor to execute the trust, and, if by *his bill he submits the administration* to that court, it might possess the power to enforce its execution, as a condition of giving its aid and relief to him. But the slave cannot enforce its execution by suit. . . . The trust is one of that class which may be valid, and yet not capable of being enforced against the trustee by judicial tribunals." — Ed.

WHO MAY BE A CESTUI QUE TRUST. — Any person capable of holding property may be the beneficiary in a trust. In other words, in almost all jurisdictions any human being may, at the present day, be a *cestui que trust*. Neither lunacy, coverture, nor infancy is a disqualification. There were formerly two exceptions to this rule, namely, aliens and slaves.

(1) *Aliens.* An alien could take, but could not hold, as *cestui que trust*. The sovereign became at once entitled to the benefit of the trust. King *v.* Sands, Freem. Ch. 129; Godfrey, Godb. 275; Daubinez *v.* Morehead, 6 Taunt. 332; Holland's Case, Aleyn, 14, 15, 16, Style 40, s. c.; Du Hourmelin *v.* Sheldon, 4 M. & Cr. 525 (*semble*);

Fourdrin *v.* Gowdey, 3 M. & K. 383; Barrow *v.* Wadkin, 24 Beav. 1; Sharp *v.* St. Sauveur, 7 Ch. 343 (overruling Rittson *v* Stordy, 3 Sm & G. 230); Dumoncel *v.* Dumoncel, 13 Ir. Eq. R. 92; Taylor *v.* Benham, 5 How. 270 (*semble*); Leggett *v.* Dubois, 5 Paige, 114; Anstice *v.* Brown, 6 Paige, 448 (*semble*); Gilmour *v.* Kay, 2 Hayw. (N. Ca.) 108; Atkin *v.* Kron, 5 Ired 207; McCaw *v.* Galbraith, 7 Rich 74; Hubbard *v.* Goodwin, 3 Leigh, 492.

In Escheator *v.* Smith, 4 McC. 452, an alien *cestui que trust* with a power of appointment, having executed the power before office found, the appointment was adjudged valid.

A contract with one as trustee for an alien was not enforceable at all. Brandon *v.* Nesbitt, 6 T. R. 23; Brandon *v.* Curling, 4 East, 410.

(2) *Slaves.* A slave could not be a *cestui que trust.* Haywood *v.* Craven, 2 L. Rep. (N. Ca.) 557; Cunningham *v.* Cunningham, 1 Tayl. 209; Bynum *v.* Bostick, 4 Dess. 266. This trust was void, and the trustee became a constructive trustee for the creator of the trust or his representative. American Society *v.* Gantrell, 23 Ga. 448 (*semble*); Craig *v.* Beatty, 11 S. Ca. 375; Blakely *v.* Tisdale, 14 Rich Eq. 90, 97 (disapproving of Fable *v.* Brown, 2 Hill, Ch. 378, where a slave was assimilated to an alien).

In North Carolina, if a slave invested his earnings, made by the consent of his master, in an obligation running to a trustee for the slave, the trustee could of course collect the obligation. White *v.* Cline, 7 Jones, (N. Ca.) 174; but the owner of the slave could not compel the trustee to hold the obligation for him (the owner); Lea *v.* Brown, 5 Jones, Eq. 379; nor to pay him the proceeds; Barker *v.* Swain, 4 Jones, Eq. 220. In Lattimore *v.* Dickson, where notes were made payable to a trustee for a slave, the trust was held to be enforceable by the slave after his emancipation. — ED.

SECTION XII.

The Trustee.

PIMBE'S CASE.

TRINITY TERM, 1585.

[*Reported in Moore,* 196. — *Translated in Cruise, Uses,* 47.]

THROCKMORTON committed high treason, 18 Eliz., for which in 26 Eliz. he was attainted by trial. Between the treason and the attainder a fine was levied to him by Scudamore of certain lands to the use of Scudamore and his wife (who was sister to Throckmorton), and of the heirs of the said Scudamore. Afterwards Scudamore and his wife bargained and sold the lands to Pimbe for money. Upon discovery of the treason and the attainder of Throckmorton, the purchaser Pimbe was advised by *Plowden*, *Popham*, and many others, that the estate of the land was in the Queen, because the Queen is entitled to all the lands that traitors had at the time of the treason, or after. So the use which was declared to Scudamore and his wife upon the fine was void, by the relation of the right of the Queen under the attainder, and the Queen must hold the land, discharged of the use, because the Crown cannot be seised to a use.[1]

Sovereig

It is but justice to mention that, the case being represented to Queen Elizabeth, she, much to her honor, granted the land to the *cestui que use* by patent.

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[1] Similarly, the King could not make a conveyance by bargain and sale. Atkins *v.* Longvile, Cro. Jac. 50.

The common statement that the crown or a state cannot be a trustee means simply that the *cestui que trust* cannot file a bill in equity against the sovereign. Dillon *v.* Freine, Poph. 72; Wike's Case, Lane, 54, 2 Roll. Ab. 780 [C] 1, s. c.; Paulett *v.* Atty. Gen., Hardres, 465, 467; Kildare *v.* Eustace, 1 Vern. 437, 439; Reeve *v.* Atty. Gen., 2 Atk 223, 1 Ves. 446 (cited), s. c.; Penn *v.* Baltimore, 1 Ves. Sr. 444, 453; Burgess *v.* Wheate, 1 Eden, 177, 255; Hodge *v.* Atty. Gen., 3 Y. & C. 342; People *v.* Ashburner, 55 Cal. 517; Shoemaker *v.* Board, 36 Ind. 175; Briggs *v.* Light Boats, 11 All. 157, 170–173; Pinson *v.* Ivey, 1 Yerg. 296, 332. In Farmers' Co. *v.* The People, 1 Sandf. Ch. 139, the difficulty of procedure seems to have been overlooked.

If the beneficiary sues by petition, the sovereign will, as a matter of course, recognize the just claim of the petitioner. Pimbe's Case, *supra*; Scounden *v.* Hawley, Comb. 172; Briggs *v.* Light Boats, 11 All. 157, 170–173. See Rustomjee *v.* Queen, 2 Q. B. Div. 69.

The validity of the trust is recognized also in legal proceedings in which the sovereign is not made a defendant. E.g.: A grantee of the sovereign takes the title subject to the trust. Winona *v.* St. Paul Co., 26 Minn. 179; Pinson *v.* Ivey, 1 Yerg. 296; Marshall *v.* Lovelass, Cam. & Nor. 217. And if the sovereign obtains the title to trust property, his title will be barred and with it the claim of the *cestui que trust* by the same lapse of time which would have protected the adverse possession if a private individual had been trustee. Miller *v.* State, 38 Ala. 600; Molton *v.* Henderson, 62 Ala. 426. — ED.

KING *v.* BOYS AND ANOTHER.

IN THE —— EASTER TERM, 1569.

[*Reported in Dyer*, 283 *b.*]

lien.

ONE T. King enfeoffed one Jasper Boys, an alien, and Forcet of Gray's Inn, to the use of himself and his wife in tail, remainder to his right heirs. Whether the Queen be entitled to a moiety of the land immediately, or not, was the question. And it seems that if an office be found of it, the Queen shall have the moiety by her prerogative to her own use, and the other use in this moiety is gone forever.[1]

THE ATTORNEY GENERAL *v.* LAUDERFIELD.

IN CHANCERY, BEFORE LORD HARDWICK, C., MICHAELMAS TERM, 1743.

[*Reported in* 9 *Modern Reports*, 286.[2]]

rporations

NOTE. In this case the Attorney General argued, that as corporations could not be seised to an use at law, no more could they be trustees, but should have the lands to their own use, divested and freed from the trust.[3]

But the CHANCELLOR would not let him go on, nothing being clearer than that corporations might be trustees.[4]

[1] Fish *v.* Klein, 2 Mer. 431; Marshall *v.* Lovelass, Cam. & Nor. 217 (*semble*) *Accord.*

An alien grantee upon trust acquired title defeasible only by the sovereign. Com. Dig. Alien, C. 4; Ferguson *v.* Franklin, 6 Munf. 305.

The alien's disability was removed in England by St. 33 Vict. c. 14, § 2; and by similar statutes an alien may at the present day in almost all jurisdictions hold property as freely as a subject, and may therefore be a trustee. In *In re* Hill, W. N. (1874), 228, the court appointed an alien as trustee of English property for beneficiaries in France. — ED.

[2] 3 Sw. 416, S. C. — ED.

[3] Chudliegh's Case, 1 Co. 122 *a*. See, *accord*, Br. Ab. Feff al Use, 60; Bury *v.* Bokenham, Dy. 8, *b*; Bacon, Uses, 57. But see, *contra*, Holland's Case, 2 Leon. 122, 3 Leon. 176, S. C. The reason for the ancient doctrine is thus quaintly expressed in Popham, 72: "Yet every feoffee is not bound although he hath knowledge of the confidence, as an Alien Person, Attaint, and the like; nor the King, he shall not be seised to another's use, because he is not compellable to perform the confidence; nor a Corporation, because it is a dead body, although it consist of natural persons: and in this dead body a confidence cannot be put, but in bodies naturall." — ED.

[4] Green *v.* Rutherforth, 1 Ves. 462, 467; Atty. Gen. *v.* Whorwood, 1 Ves. Jr. 534, 536; Atty. Gen. *v.* Governors, 2 Ves. Jr. 41, 46; Dummer *v.* Corporation, 14 Ves. 245, 252; Atty. Gen. *v.* Caius College, 2 Keen, 150, 165; Evans *v.* Corporation, 29 Beav. 144; Vidal *v.* Girard, 2 How. 127, 187; Miller *v.* Lerch, 1 Wall. Jr. 210; Stone *v.* Bishop, 4 Cliff. 593; First Society *v.* Atwater, 23 Conn. 34; Phillips Academy *v.* King, 12 Mass. 546; Webb *v.* Neal, 5 All. 575; Commissioners *v.* Walker,

JEVON v. BUSH.

IN CHANCERY, BEFORE LORD JEFFREYS, C., NOVEMBER 27, 1685.

in 1647

[*Reported in* 1 *Vernon*, 342.]

LORD BELLAMOUNT lent £600 to one Gardiner on a recognizance of £1,000, which he took in the name of the defendant Bush, and intended it as a provision for the plaintiff, his infant daughter, then but two years old; and Bush at the same time executed a declaration of the trust. Gardiner being about to sell his estate, and the purchaser having notice of the recognizance, Bush is prevailed 1654 upon to acknowledge satisfaction; and in 1657, and not before, the plaintiff had notice of this declaration of trust, and, understanding that Bush had acknowledged satisfaction on this recognizance, brings her bill to be relieved against this breach of trust.

Infant

1657

The defendant by answer insisted, and it was so proved in the cause, that he was but eighteen years old when he made this declaration of trust; and insisted likewise, that he never had one penny for his acknowledging satisfaction on that recognizance, but that Lord Bellamount's widow, as he believes, received the moneys due thereon.[1]

The counsel for the defendant insisted, that the plaintiff ought to prove some fraud in the trustee, or that he received to his own use part of the money.

LORD CHANCELLOR. The proof lies on the defendant's side; he ought to discharge himself, and it is not sufficient for him to say he never received any of this money for his own use: there is no doubt but an infant may be a trustee;[2] and the breach of trust was committed in 1654, after he was of full age; and therefore decreed him to pay the principal money, with damages not exceeding £1,000, being the penalty of the recognizance; and cited my Lord Hobart, who says that *cestui que trust* in an action of the case against his trustee shall recover for a breach of trust in damages. wrong

infra 235, note 2.

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7 Miss. 143, 185; Wade *v.* American Society, 15 Miss. 663; Chambers *v.* St. Louis, 29 Mo. 543; Trustees *v.* Peaslee, 15 N. H. 317 (*semble*); *Re* Howe, 1 Paige, 214; Sheldon *v.* Chappell, 47 Hun, 59; Columbia Co. *v.* Kline, Bright. N. P. 320; *Ex parte* Greenville, 7 Rich. Eq. 471, 476, 483; Bell Co. *v.* Alexander, 22 Tex. 350 *Accord.*

The court may appoint a corporation a trustee. Anon., 7 Phila. 517. But see *Re* Brogden, W. N. (1888), 238. It was decided in *In re* Franklin's Est. (Pa. 1892), 24 Atl. R. 626, that a municipal corporation could not become a trustee of a purely private trust. But see Gloucester *v.* Osborn, 1 H. L. 272, 285. — ED.

[1] The statement of facts has been abridged. — ED.

[2] Although an infant may be a trustee, no judicious person and no court would appoint an infant as trustee. An infant, it is obvious, has not the discretion requisite to the due administration of a trust, and cannot be held accountable for its maladministion. Russel's Case, 5 Rep. 27 *a*; Whitmore *v.* Weld, 1 Vern. 328; Hindmarsh *v.* Southgate, 3 Russ. 324; in which cases it was adjudged that an infant executor was not liable for a *devastavit.*

There was formerly, however, no mode of divesting the infant trustee of his title to

PEGGE *v.* SKYNNER AND RICHARDSON.

IN CHANCERY, BEFORE LORD THURLOW, C., MAY 22, 1784.

[*Reported in* 1 *Cox, Equity Cases,* 23.]

sane

BILL for specific performance of an agreement for a lease from plaintiff to defendants. It was objected that the defendant Richardson had since become incapable of doing any act in consequence of a paralytic stroke. It was ordered that the defendant Skynner should execute a counterpart of a lease, and also the defendant Richardson, when he should be capable of so doing.[1]

LORD THURLOW refused to give plaintiff costs.

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the trust property. An equity judge could make no other decree against the infant than that which was made in Anonymous, 3 P. Wms. 389, n. [A]; namely, "to convey when of age, unless he should show cause to the contrary within six months after he should come of age." See also Perry *v.* Perry, 65 Me. 399; Whitney *v.* Stearns, 11 Met. 319; and compare King *v.* Bellord, 1 H. & M. 343.

The first remedial statute was passed in 1708, St. 7 Anne, c. 19, which was followed by St. 6 Geo. IV. c. 74, § 2 But these statutes applied only to bare, express trustees. *Ex parte* Vernon, 2 P. Wms. 549; Goodwin *v.* Lister, 3 P. Wms. 387; Hawkins *v.* Obeer, 2 Ves. 559; Atty. Gen. *v.* Pomfret, 2 Cox, Eq. 221; *Ex parte* Beddam, 1 Rose, 310; Bullock *v.* Bullock, 1 J. & W. 603; King *v.* Turner, 2 Sim. 549; *Re* Moody, Tamlyn, 4. But by the Trustee Act of 1850, 12 & 13 Vict. c. 74, § 7, the title of an infant trustee may by the Court of Chancery be vested in a suitable person, whether the trust be express or constructive, and whether the trustee is a bare trustee or has a beneficial interest. There are similar statutes in this country. Hawthorn *v.* Root, 6 Bush, 501; Bridges *v.* Bidwell, 20 Neb. 185; *Re* Follen, 14 N. J. Eq. 147; Ownes *v.* Ownes, 23 N. J. Eq. 60, Livingston *v.* Livingston, 2 Johns. Ch. 537; Thompson *v.* Dulles, 5 Rich. Eq 370. Such statutes have of course no extra-territorial force. Sutphen *v.* Fowler, 9 Paige, 280.

Independently of these statutes, if an infant trustee actually conveyed to the *cestui que trust*, or according to his directions, he could not, on attaining majority, disaffirm the conveyance. —— *v.* Handcock, 17 Ves. 384, Elliott *v.* Horn, 10 Ala. 348; Starr *v.* Wright, 20 Oh. St. 97; Thompson *v.* Dulles, 5 Rich. Eq. 370.

Although, as we have seen, an infant was not liable for a breach of trust, he was chargeable *ex delicto* as a constructive trustee for any property acquired by his misconduct. Anon., 2 Eq. Ab. 489, n. (a), 1 DeG. & Sm. 118, n.; Clare *v.* Watts, 9 Vin. Ab. 415; Anon., 2 Eden, 71, 72; Overton *v.* Banister, 3 Hare, 503; Lempriere *v.* Large, 12 Ch. D. 675. — ED.

[1] Owen *v.* Davies, 1 Ves. 82; Hall *v.* Warren, 9 Ves. 605 *Accord.*

Apart from statutes, the only decree that could be made against a trustee *non compos mentis* was in the form indicated in the principal case. The difficulty was removed in England in 1731, in the case of express, bare trustees, by St. 4 Geo. II. c. 10, and St. 6 Geo. IV. c. 74, § 3. But the old rule continued as to constructive trusts and trusts in which the trustee had an interest. *Ex parte* Tutin, 3 V. & B. 149; *Ex parte* Currie, 1 J. & W. 642. But by the Trustee Act of 1850, § 3, the Equity judges were authorized to vest the title of a lunatic trustee in a suitable person, whether the trust was constructive or express, and whether the trustee was a bare trustee or beneficially interested. See also the Lunacy Act of 1890, §§ 135, 136. There are similar statutes in this country. *Re* Wadsworth, 2 Barb. Ch. 281; Swartout *v.* Burr, 1 Barb. 495.

A lunatic trustee is, of course, not liable for a breach of trust. — ED.

STILL AND WIFE *v.* RUBY AND OTHERS.

IN THE SUPREME COURT, PENNSYLVANIA, JANUARY TERM, 1860.

[*Reported in 35 Pennsylvania Reports,* 373.]

ERROR to the District Court of Philadelphia.

Couuline

This was a *scire facias* by Mary Ruby and John Ruckstool and Eliza A. Ruckstool, which Mary Ruby and Eliza A. Ruckstool were trustees of The Heart and Hand Female Beneficial Society of Philadelphia, against Charles Still and Sarah K., his wife, on a mortgage given by the defendants to the female plaintiffs, as trustees, on the 19th February, 1856, to secure the payment of $500 and interest, in one year from the date thereof.

The following affidavit of defence was filed by Charles Still, one of the defendants: —

"Charles Still, one of the above-named defendants, and on behalf of his co-defendant, being duly sworn, &c., saith: That they have a just and legal defence to the whole of plaintiffs' claim in the above case, the nature and character of which is as follows: That the said Eliza A. Ruckstool, one of the above-named plaintiffs, before and at the time of the commencement of this suit, and at the time of the execution of the mortgage on which said suit is brought, was and still is married to one John Ruckstool, then and yet her husband, who is still living, to wit, at Philadelphia aforesaid, in the county aforesaid; and this deponent for himself and his co-defendant further says, that they have not, nor has either of them, any knowledge of John Ruckstool joined as a party plaintiff in this suit, except as the reputed husband of the said Eliza A. Ruckstool — his name does not appear in the mortgage on which this suit is brought — nor have this deponent and his co-defendant, or has either of them, at any time had any transactions of business or otherwise with him. All of which the deponent expects to be able to prove on the trial of the case."

The court below, on motion of the plaintiffs' counsel, gave judgment for want of a sufficient affidavit of defence, which was here assigned for error.

J. M. Arundel, for the plaintiff in error.

Brinklè and *B. A. Mitchell,* for the defendants in error.[1]

The opinion of the court was delivered by

WOODWARD, J. — The affidavit disclosed no defence whatever. Mrs. Ruckstool, as appeared on the face of the mortgage, was only trustee for The Heart and Hand Female Beneficial Society, in whom the beneficial interest of the mortgage was vested. *Femes covert,* like infants, lunatics, and others *non sui juris,* may be trustees, subject, of course, to their legal incapacity to deal with the estate vested in them.

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[1] The arguments of counsel are omitted. — ED.

Hill on Trustees, 49. The incapacity of Mrs. Ruckstool to sue in her own name was obviated by her husband joining with her. The mortgagors must pay the money as they agreed to do.

The judgment is affirmed.[1]

IN RE CAMPBELL'S TRUST.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JUNE 4, 1862.

[*Reported in* 31 *Beavan*, 176.]

Feme sole

THIS was a petition to appoint two new trustees. One of the persons proposed was a feme sole, but who was, in all other respects, unexceptionable.

Mr. Cutler in support of the petition.

THE MASTER OF THE ROLLS doubted whether the court ever appointed a feme sole to be a trustee. He said he would consult the other judges.

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[1] A married woman may be a trustee. King v. Denison, 1 V. & B. 277; Gridley v. Wynant, 23 How. 500; Harden v. Darwin, 66 Ala. 55; Milner v. Freeman, 40 Ark. 62; Cotton v. Wood, 25 Iowa, 43; Springer v. Berry, 47 Me. 330, 338; Wilson v. Beauchamp, 44 Miss. 556; Darrier v. Darrier, 58 Mo. 222; Seibold v. Christman, 7 Mo. Ap. 254; Sawyer's App., 16 N. H. 459, Persons v. Persons, 25 N. J. Eq. 250; Parker v. Nevitt, 18 Oreg. 274; Dean v. Sanford, 9 Rich. Eq. 423, 425; Smith v. Strahan, 16 Tex. 314; Wallace v. Bowen, 28 Vt. 638. In Milbank v. Crane, 25 How. Pr. 193, a married woman was appointed a trustee by the court.

In the absence of legislation, a married woman who is a trustee cannot convey the title to the trust property any more freely than a married woman holding in her own right. Co. Lit. 112 *a*, Hargreave's note 6; Daniel v. Uhley, W. Jones, 137; McNeillie v. Acton, 17 Jur. 1041, 2 Eq. Rep. 21, s. c.; 1 Fonbl. Tr. Eq. 92; Dundas v. Biddle, 2 Barr, 160. The husband must also join in the receipt for purchase money. Drummond v. Tracy, Johns. 608; Kingsman v. Kingsman, 6 Q. B. Div. 122, 128; and must likewise be co-plaintiff or co-defendant with her in legal proceedings. People v. Webster, 10 Wend. 554; Kingsman v. Kingsman, 6 Q. B. Div. 122. *Re* Docwra, 29 Ch. D. 693.

By St. 3 & 4 Wm. IV. c. 74, § 91, if there was an incapacity of the husband to join in the conveyance, the wife might convey alone on application to the Court of Common Pleas. *Re* Mirfin, 4 M. & G. 635; *Re* Caine, 10 Q. B. D. 284. By 37 & 38 Vict. c. 78, § 6, a married woman who is a bare trustee of freeholds, or copyholds, may convey as freely as a feme sole; and by 45 & 46 Vict. c. 75, the same power was conferred with regard to annuities, bank deposits, and corporate shares. In this country, almost universally, a feme covert trustee is independent of her husband in her dealings with trust property. See, for example, Claussen v. La Franz, 1 Iowa, 226. Formerly a married woman trustee could not bind herself by any contracts relating to the trust property. Avery v. Griffin, 6 Eq. 606. And the liability for any breach of trust fell not upon her, but upon her husband. Smith v. Smith, 21 Beav. 385; Wainford v. Heyl, 20 Eq. 321; *Re* Smith, 48 L. J. Ch. 205; Bahin v. Hughes, 31 Ch. Div. 390. By St. 45 & 46 Vict. c. 75, §§ 1, 18, 24, the husband is no longer liable for his wife's breaches of trust.

The coverture of a trustee was thought to be a sufficient ground for removal in Lake v. De Lambert, 4 Ves. 592, a. See also Taylor v. Allen, 2 Atk. 213; *Re* Kaye, 1 Ch. Ap. 387. — ED.

THE MASTER OF THE ROLLS, having done so, and the affidavits being satisfactory, made the order as asked.[1]

RE HATTATT'S TRUSTS.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JANUARY 22, 1870.

[*Reported in* 18 *Weekly Reporter*, 416.]

Husband

THIS was a petition for the appointment of a new trustee.

The proposed trustee was a Mr. Knightly, who was the husband of one of the *cestuis que trustent.*

The *cestuis que trustent* were all *sui juris*, and there were the usual affidavits of the fitness of the proposed trustee.

Speed, for the petitioner, mentioned the matter to the Court.

LORD ROMILLY, M. R., said he would make the order, but the new trustee must undertake to apply immediately to the Court for the appointment of a new trustee in case of his becoming a sole trustee.[2]

WILDING *v.* BOLDER.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M.R., DECEMBER, 22, 1855.

[*Reported in* 21 *Beavan*, 222.]

Near Relat

MR. CAIRNS appeared in support of a petition to appoint new trustees, one of whom was related to the *cestuis que trust.*

THE MASTER OF THE ROLLS. I cannot depart from the rule I have adopted of not appointing a near relative a trustee, unless I find it absolutely impossible to get some one unconnected with the family to undertake that office.

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[1] *Re* Berkley, 9 Ch. 720; *Ex parte* Black, 1 Bland, 142 n. (f); Gibson's Case, 1 Bland, 138 *Accord.*

Brook *v.* Brook, 1 Beav. 176 *Contra.* — ED.

[2] *Re* Parrot, W. N. (1881) 158, 30 W. R. 97 s. c. *Accord.* See also *Re* Davis, 12 Eq. 214; *Re* Jesson, Lewin, Trusts (8th ed.), 41 n. (h).

But the court refused to appoint a husband as trustee in *Re* Lowdell, Lewin, Trusts (8th ed.), 41 n. (h); *Ex parte* Hunter, Rice Eq. 293; Dean *v.* Lanford, 9 Rich. Eq. 423. In Boaz *v.* Boaz, 36 Ala. 334, a husband was removed from his trusteeship because he had permanently abandoned his wife.

A *cestui que trust*, having the power of naming a trustee in case of a vacancy, may appoint her husband. Tweedy *v.* Urquhart, 30 Ga. 446.

It goes without saying that a husband may act as trustee if appointed by the creator of the trust. — ED.

I have always observed, that the worst breaches of trust are committed by relatives, who are unable to resist the importunities of their *cestuis que trust*, when they are nearly related to them.[1]

Ex Parte CONYBEARE'S SETTLEMENT.

In Chancery, before Sir G. J. Turner and Sir J. L. Knight Bruce, L. JJ., June 24, 1853.

[Reported in 1 *Weekly Reporter*, 458.]

stui

Conybeare moved for the appointment as trustee of one of the *cestui que trusts* of an estate in the place of a trustee incapacitated from acting, in consequence of insanity. All parties were desirous that the appointment of the gentleman proposed should be made, and there were special circumstances in the case not necessary to be referred to for the purposes of the report. The Master of the Rolls had declined to make the order asked, on the ground that the Court ought not to appoint a *cestui que trust* as the trustee, even though there was not any other objection to his appointment.

Turner, L. J. Under ordinary circumstances, no doubt, the Court will not appoint a trustee who is also one of the *cestui que trusts;* but the rule is not imperative, and when there are special circumstances, the Court will exercise its discretion in judging whether the case is one in which the rule may be departed from. Here I think, under the special circumstances, we may make the appointment asked.[2]

Knight Bruce, L. J., concurred.

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[1] See Parker *v.* Moore, 25 N. J. Eq. 228, 240.

Relationship between proposed trustees is not a fatal objection to their appointment. *Re* Lancaster Charities, 9 W. R. 192. But see, as to trusts under the Settled Land Act, *Re* Knowles, 27 Ch. D. 707; *Re* Norris, 27 Ch. D. 333; *Re* Brintnall, W. N. (1872), 77. — Ed.

[2] *Ex parte* Clutton, 17 Jur. 988; *Re* Clissold, 10 L. T. Rep. 642; Tempest *v.* Camoys, 58 L. T. Rep. 221; Custis's Trust, 5 Ir. R. Eq. 429; Milbank *v.* Crane, 25 How. Pr. 193; Kenderdine's Est., 12 W. N. (Pa.) 423 *Accord.*

It is customary now to require an undertaking that, whenever a beneficiary trustee becomes sole trustee, he shall immediately take steps for the appointment of a co-trustee, as in *Re* Burgess, W. N. (1877), 87; *Re* Lightbody, 52 L. T. Rep. 40. Compare Forster *v.* Abraham, 17 Eq. 351.

The creator of the trust may make a *cestui que trust* one of the trustees. This was the case in Tempest *v.* Camoys, 58 L. T. Rep. 221; Amory *v.* Lord, 9 N. Y. 403; Bundy *v.* Bundy, 38 N. Y. 410; Wetmore *v.* Truslow, 51 N. Y. 338; Tiffany *v.* Clark, 58 N. Y. 632; Moke *v.* Norris, 14 Hun, 128, 2 Redf. 429 (criticising Craig *v.* Hone, 2 Edw. Ch. 564); Rogers *v.* Rogers, 18 Hun, 409.

In *Re* Mayfield, 17 Mo. Ap. 684, a trustee was removed on the ground that he was the confidential clerk of a *cestui que trust* who was at odds with another *cestui que*

IN RE BARKER'S TRUSTS.

IN CHANCERY, BEFORE SIR GEORGE JESSEL, M.R., NOVEMBER 6, 1875.

[*Reported in 1 Chancery Division, 43.*]

THIS was a Petition under the *Trustee Act*, 1850, and the *Bankruptcy Act*, 1869, asking for the removal of the sole trustee of a will (who had also a beneficial interest under it), on the ground that he had been adjudicated bankrupt, and for the appointment of a new trustee in his place, and for a vesting order.

Bankrupt

Part of the property subject to the trusts of the will consisted of bonds transferable by delivery with coupons. The trusts were to receive the income and pay it to one of the Petitioners during life.

Chitty, Q. C., and *Bush*, in support of the Petition.

Chapman Barber, for the trustee, said that it had never been held that bankruptcy alone was a sufficient reason for the removal of a trustee. There was no case of misconduct made out against the present trustee, and if the safe custody of the property was desired, that object would be sufficiently attained by the appointment of an additional trustee.

Chester, for other parties.

JESSEL, M. R. In my view, it is the duty of the court to remove a bankrupt trustee who has trust money to receive or deal with, so that he can misappropriate it. There may be exceptions, under special circumstances, to that general rule;[1] and it may also be that where a trustee has no money to receive he ought not to be removed merely because he has become bankrupt; but I consider the general rule to be as I have stated.[2] The reason is obvious. A necessitous man is more likely to

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trust. The court declined to appoint a remainderman as trustee in *Re* Paine, 33 W. R. 564, and a tenant for life in *Re* Harrop, 27 Ch. D. 333. For further instances of disqualification on the score of interest, see *Re* Kemp, 24 Ch. Div. 485; *Re* Norris, 27 Ch. D. 333; Jones *v.* Stockett, 2 Bland, 434; and compare Gaskill *v.* Green, 152 Mass. 526. — ED.

[1] As in *Re* Bridgman, 1 Dr. & Sm. 164; Cooper *v.* Cooper, 1 Hal. Ch. 9, 11. See also *Re* Adams, 14 Ch. D. 634. — ED.

[2] Gladdon *v.* Stoneman, 1 Mad. 143, n. (a); Bainbrigge *v.* Blair, 1 Beav. 495; *Ex parte* Vaughan, 13 L. J. Bak. 22; Harris *v.* Harris, 29 Beav. 107; *Re* Hopkins, 19 Ch. Div. 61; *Re* Mitchell, 52 L. T. Rep. 178, 180 (*semble*); *Re* Adams, 14 Ch. D. 634; *Re* Roche, 1 Con. & Laws. 306, 2 Dr. & War. 287, 289; Commissioners *v.* Archbold, 11 Ir. Eq. R. 187 (but see 2 H. & C. 440, 461) *Accord.*

The court may, but is not bound to, remove a trustee for insolvency. Stainton *v.* Carron Co., 18 Beav. 146; Paddock *v.* Palmer, 6 How. Pr. 215 (insolvent when appointed *cestui que trust*, and known to be so). See also Scott *v.* Becher, 4 Price, 346; Mansfield *v.* Shaw, 3 Mad. 100; Rev. Code Ala., § 3164. In Virginia, an insolvent trustee will not be allowed to act unless he gives bonds. Terry *v.* Fitzgarrard, 32 Grat. 893. A bankrupt or insolvent may of course be made a trustee by the creator of the trust. Scott *v.* Carron Co., 18 Beav. 146; Williams *v.* Nichol, 47 Ark. 254; Shryock *v.* Waggoner, 28 Pa. 430.

Poverty or limited means was thought to be an insufficient ground for removing a be tempted to misappropriate trust funds than one who is wealthy; and besides, a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people.

However, if special circumstances are required for the removal of a bankrupt trustee, I should in the present case find them in the nature of the trust property. Part of the property consists of bonds with coupons, which could very easily be made away with. The trustee must be removed, and I make an order accordingly.

ATTORNEY GENERAL *v.* HICKMAN.

In Chancery, before Lord King, C., Trinity Term, 1732.

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[illegible]

[*Reported in W. Kelyng*, 34.[1]]

This was an information exhibited by the Attorney General for the performance of a charity, given by a codicil annexed to the testator's

trustee in Jones *v.* McPhillips, 77 Ala. 314; Van Boskerck *v.* Herrick, 65 Barb. 250. And in the analogous cases of executorship: Hathornthwaite *v.* Russell, 2 Atk. 126; Howard *v.* Papera, 1 Mad. 142; Manners *v.* Furze, 11 Beav. 30, 31.

Old age was thought to be a sufficient ground for removing a trustee in Jones *v.* Stockett, 2 Bland, Ch. 434 (*semble*); Dorsey *v.* Thompson, 37 Md. 25, 37 (*semble*). In Franklin *v.* Hays, 2 Swan, 521, the court, instead of removing the aged trustee, resorted to the strange expedient of appointing an assistant for him.

Drunkenness. Habitual intemperance is a sufficient reason for the removal of a trustee. Everett *v.* Prythergch, 12 Sim. 363, 367-368; Fish *v.* Stubbs, 30 Ala. 335; Bayles *v.* Staats, 1 Hal. Ch. 573.

Incontinence was thought not to warrant the removal of a trustee in Abernethy *v.* Abernethy, 8 Fla. 243.

Friction. A trustee will be removed if the relations between himself and his fellows are so inharmonious as to prevent the co-operation essential to the successful administration of the trust, as in Uvedale *v.* Ettrick, 2 Ch. Cas. 130; Quackenbos *v.* Southwick, 41 N. Y. 117; *Re* Morgan, 63 Barb. 621; Blake *v.* Sands, 3 Redf. 168 (*semble*); Russak *v.* Tobias, 12 N. Y. Civ. Pr. 390; Syfert's Est., 9 Phila. 320.

Friction between the trustee and the *cestui que trust*, in cases where the trustee has a discretion as to the amount the beneficiary shall receive, is also a sufficient ground for removal. McPherson *v.* Cox, 96 U. S. 404 (*semble*); Wilson *v.* Wilson, 145 Mass. 490; Austin *v.* Austin, 18 Neb. 306. See also Scott *v.* Rand, 118 Mass. 215; Howell's Est., 16 Phila. 232; Hiller's Est., 9 Phila. 421. But when the duties of the trustee are merely ministerial and there is no occasion for personal intercourse, the trustee will not be removed simply because of unfriendly relations between him and the *cestui que trust*. Forster *v.* Davies, 4 D. F. & J. 133; McPherson *v.* Cox, 96 U. S. 404; Nickels *v.* Phillips, 18 Fla. 732; Berry *v.* Williamson, 11 B. Mon. 245, 271; Gibbes *v.* Smith, 2 Rich. Eq. 131.

In the case of a religious trust, persons holding views at variance with the object of the trust, should not be appointed or retained as trustees. Atty. Gen. *v.* Shore, 7 Sim. 309, 317; Atty. Gen. *v.* Pearson, 7 Sim. 290, 308, 309, 3 Mer. 353; *Re* Ilminster, 4 Jur. N. S. 676, 8 H. L. C. 495; Atty. Gen. *v.* St. John, 2 Ch. D. 554; Ross *v.* Crockett, 14 La. An. 811. — Ed.

[1] 2 Eq. Ab. 193, s. c. — Ed.

will, by which he devised that what should remain and be the residue of his estate and effects be given for encouraging such Non-conforming ministers as preach God's Word in places where the people are not able to allow them sufficient and suitable maintenance; and for the encouraging such as are designed to labor in God's vineyard as Dissenters, and appointed two persons to have the disposal and appointment of the said charity, both which persons died in the lifetime of the testator.

Two questions arose, 1st,[1] Whether both the trustees, to whom the disposal and appointment of the said charity was given, dying in the lifetime of the testator, this charity was not gone, and in the nature of a lapsed legacy?

But per KING, Chancellor. The substance of the charity remains notwithstanding the death of the trustees before the testator; and though at law it is a lapsed legacy, yet in equity it is subsisting, and here is a sufficient certainty of the testator's intentions to revive it; the intention of the party therefore is sufficiently manifest that this charity should continue within 43 Eliz. c. 4.[2]

SONLEY AND OTHERS *v.* THE MASTER, &c. OF THE CLOCK-MAKERS' COMPANY.

IN CHANCERY, BEFORE MR. BARON EYRE, FOR LORD CHANCELLOR, MAY 30, 1780.

[*Reported in* 1 *Brown Chancery Cases*, 81.]

CONYERS DUNLOP devised freehold estates to his wife for life, remainder to his brother Charles in tail male, remainder to the Clockmakers' Company, in trust that they should, as soon as conveniently might be after the decease of his wife and brother Charles without issue male, or after the death of such issue under the age of twenty-one years, sell the premises, and that the money to arise from such sale, and the receipts and profits from the decease, &c. till the sale should be divided among all and every the testator's nephews and nieces already born, or to be born, and their child or children begotten, or to be begotten, to wit, &c. The testator's wife and brother both died in his lifetime. The question therefore was, whether the devise to the corporation being void, the heir at law took beneficially, or subject to the trust.

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[1] Only so much of the case is given as relates to this point. — ED.

[2] Attorney General *v.* Downing, Amb. 549, Wilmot, 21 S. C.; Moggridge *v.* Thackwell, 1 Ves. Jr. 464, 475, per Lord Thurlow; *Re* Gill, 1 Seton, Decrees (4th ed.), 520; *Re* Sminthwaite's Trusts, 11 Eq. 251; Charteris *v.* Charteris, 10 Ont. 738; Dorsey *v.* Thompson, 37 Md. 25, 46; Cowman *v.* Colquhoun, 60 Md. 127, 134 *Accord.* — ED.

Mr. Baron Eyre. Although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise.[1] This is the ground upon which courts of equity have decreed, in cases where no trustee is named.

Decreed that the heir at law is a trustee to the uses of the will.[2]

DODKIN *v.* BRUNT.

In Chancery, before Sir R. Malins, V. C., May 7, 1868.

[*Reported in Law Reports*, 6 *Equity*, 580.]

[illegible]
tees by Ct.

This was a suit to administer the estate of George Russell, who, by his will, dated the 17th of August, 1866, devised certain property to an infant for life, with remainder to his wife for life, remainder to the children of the marriage in succession. There were executors appointed by the will, but no trustees were nominated. A decree was made in the suit directing that trustees should be appointed of the testator's estate.

The executors, who were the defendants in the suit, were appointed trustees in Chambers, and minutes were prepared for carrying out the order, but the Registrar objected to draw it up, on the ground that the Act 15 & 16 Vict. c. 55, s. 9, did not embrace the case where no trustees had ever been appointed; for although the concluding words of the 9th section appeared to justify an order appointing a new trustee, whether there was any existing trustee or not at the time of the order being made, still the introductory words of the section seemed to contemplate the appointment of a new trustee only. The Registrar further stated that he could find no case in the office in which an appointment had been made under the Trustee Act, where no trustee had been originally appointed by the testator. He suggested, however, that the appointment might be made under the general equitable jurisdiction of the Court, should the Act be considered insufficient.

Mr. Osborne Morgan, on behalf of the parties to the suit, stated the

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[1] Anon., 2 Vent. 349; Farmers' Co. *v.* Chicago Co., 27 Fed. Rep. 146; Vidal *v.* Girard, 2 How. 127; Walker *v.* Walker, 25 Ga. 420; Byers *v.* McCarty, 62 Iowa, 339; Jackson *v.* Hartwell, 8 Johns. 422; Sheldon *v.* Chappell, 47 Hun, 59; Frazier *v.* Rector (Pa., 1892), 23 Atl. R. 442; White *v* Baylor, 10 Ir. Eq. R. 43, 53–54.

If the trustee and *cestui que trust* are both incapable of taking, the trust fails altogether. American Society *v.* Gantrell, 23 Ga. 448. — Ed.

[2] "Declared that the devise of the estate to the Clock-makers' Company was void in law; but that the same descended to the heirs at law of the testator, upon and subject to the trusts in his said will." — R. L.

Registrar's objection, and submitted that the Court had power to make the order independently of the Act.

SIR R. MALINS, V. C. My opinion is, that the Court has inherent jurisdiction in a cause to appoint trustees of a will, in a case where no trustees were originally appointed by the testator. I shall, therefore, direct the order appointing Messrs. Brunt and Kent trustees to be drawn up.[1]

ADAMS v. ADAMS.

IN THE SUPREME COURT, UNITED STATES, OCTOBER, 1874.

[*Reported in* 21 *Wallace*, 185.]

APPEAL from the Supreme Court of the District of Columbia. The case was thus.

Adams, a government clerk in Washington, owning a house and lot there, on the 13th of August, 1861, executed, with his wife, a deed of the premises to one Appleton, in fee, as trustee for the wife. The deed by appropriate words *in præsenti* conveyed, so far as its terms were concerned, the property for the sole and separate use of the wife for life, with power to lease and to take the rents for her own use, as if she was a feme sole; the trustee having power, on request of the wife, to sell and convey the premises in fee and pay the proceeds to her or as she might direct; and after her death (no sale having been made), the trust being that the trustee should hold the property for the children of the marriage as tenants in common, and in default of issue living at the death of the wife, then for Adams, the husband, his heirs and assigns.

The deed was signed by the grantors, and the husband acknowledged it before two justices "to be his act and deed." The wife did the same; being separately examined. The instrument purported to be "signed, sealed, and delivered" in the presence of the same justices, and they signed it as attesting witnesses. The husband put it himself on record in the registry of deeds for the county of Washington, D. C., which was the appropriate place of record for it.

[1] Pitt *v.* Pelham, Freem Ch. 134; Locton *v.* Locton, Freem. Ch. 136; Bentham *v.* Wiltshire, 4 Madd. 44; Johnson *v.* Mayne, 4 Iowa, 180; Nason *v.* First Church, 66 Me. 100, Bartlett *v.* Nye, 4 Met. 378, Bailey *v.* Kilburn, 10 Met. 176; First Society *v.* Fitch, 8 Gray, 421; *Re* Eastern Co., 120 Mass. 412; Wheeler *v.* Perry, 18 N. H. 307; De Barante *v.* Gott, 6 Barb. 492; Sheldon *v.* Chappell, 47 Hun, 59, 63; Sowers *v.* Cyrenius, 39 Oh. St. 29; Varner's App., 80 Pa. 140; Barret *v.* Barret, 4 Dess. 447; Porter *v.* Rutland Bank, 19 Vt. 410, 420 *Accord.* See also *Re* Davis's Trusts, 12 Eq. 44; *Re* Gillett's Trusts, 25 W. R. 23; *Re* Moore, 21 Ch. D. 778; decided under the Trustee Acts of 1850. — ED.

Subsequent to this, that is to say in September, 1870, the husband and wife were divorced by judicial decree.

And subsequently to this again, that is to say, in December, 1871, — the husband being in possession of the deed, and denying that any trust was ever created and executed, and Appleton, on the wife's [husband's?] request, declining to assert the trust, or to act as trustee, — Mrs. Adams filed a bill in the court below against them both, to establish the deed as a settlement made upon her by her husband, to compel a delivery of it to her; to remove Appleton, the trustee named in it, and to have some suitable person appointed trustee in his place.

The court below declared the trust valid and effective in equity as between the parties; appointed a new trustee; required the husband to deliver up the deed to the wife or to the new trustee; and to deliver also to him possession of the premises described in the deed of trust, and to account before the master for the rents and profits of it which had accrued since the filing of the bill, receiving credit for any payment made to the complainant in the mean time, and to pay the complainant's costs of the suit.

From a decree accordingly, the husband appealed.[1]

Messrs. T. J. D. Fuller and *E. Lander*, for the complainant.

Messrs. W. W. Boyce and *John Selden*, *contra*.

MR. JUSTICE HUNT delivered the opinion of the Court.

The first question in this case is whether there was a delivery of the deed of August 13th, 1861. If not a formal ceremonious delivery, was there a transaction which, between such parties and for such purposes as exist in the present case, the law deems to be sufficient to create a title? The bill avers that the deed was delivered by the parties and put on record in the way which it states.

The answer is responsive to the allegations in the plaintiff's bill, that the deed, after being signed, sealed, and delivered, was recorded at the request of the defendant, Adams, and at his expense.

The burden is thus imposed upon the plaintiff of maintaining her allegation by the proof required where a material allegation in the bill is denied by the answer.

It is evident, however, that the apparent issues of fact and seeming contradictions of statement become less marked by looking at what the parties may suppose to constitute a delivery. That the defendant signed and sealed the deed he admits. That with his wife, the present plaintiff, he acknowledged its execution before two justices of the peace, and that the deed thus acknowledged by him not only purported by words *in præsenti* to grant, bargain, and convey the premises mentioned, but declared that the same was signed, sealed, and delivered, and that this deed, with these declarations in it, he himself put upon the record, is not denied. If these facts constitute a delivery under circumstances like the present, then the defendant, when he denies that a delivery was made, denies the law simply.

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[1] The statement of facts is abridged, and a part of the opinion is omitted. — ED.

Mrs. Adams and two other witnesses were examined. None of Mrs. Adams's statements are denied by Mr. Adams. He was as competent to testify as she was. So, although time, place, and circumstances are pointed out in the testimony of one of the other witnesses, the defendant makes no denial of the statement; nor does he deny the statement of the other witness, giving her conversation with him in detail, in which she says that he admitted the trust.

The deed corresponded substantially with the intention which these witnesses state that Adams expressed. Should the property be sold by the order of Mrs. Adams, the money received would be subject to the same trusts as the land, to wit, for the use of Mrs. Adams during her lifetime aud her children after her death. It would not by such transmutation become the absolute property of Mrs. Adams.

Upon the evidence before us we have no doubt that the deed was executed, acknowledged, and recorded by the defendant with the intent to make provision for his wife and children; that he took the deed into his own possession with the understanding, and upon the belief on his part, that he had accomplished that purpose by acknowledging and procuring the record of the deed, by showing the same to his wife, informing her of its contents, and placing the same in the house therein conveyed in a place equally accessible to her and to himself.

The defendant now seeks to repudiate what he then intended, and to overthrow what he then asserted and believed he had then accomplished.

It may be conceded, as a general rule, that delivery is essential, both in law and in equity, to the validity of a gift, whether of real or personal estate.[1] What constitutes a delivery is a subject of great difference of opinion, some holding that a parting with a deed, even for the purpose of recording, is in itself a delivery.[2]

It may be conceded also to have been held many times that courts of equity will not enforce a merely gratuitous gift or mere moral obligation.[3]

These concessions do not, however, dispose of the present case.

1st. We are of opinion that the refusal of Appleton, in 1870, to accept the deed, or to act as trustee, is not a controlling circumstance.

Although a trustee may never have heard of the deed, the title vests in him, subject to a disclaimer on his part.[4] Such disclaimer will not, however, defeat the conveyance as a transfer of the equitable interest to a third person.[1] A trust cannot fail for want of a trustee, or by the refusal of all the trustees to accept the trust.[2] The court of chancery will appoint new trustees.[1]

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[1] 12 Vesey, 39 and note, Antrobus v. Smith.

[2] Cloud v. Calhoun, 10 Richardson's Equity, 362.

[3] Ibid.

[4] Cloud v. Calhoun, 10 Richardson's Equity, 362. See, to the same effect, Smith v. Wheeler, 1 Vent. 128 (approved in Standing v. Bowring, 31 Ch. Div. 282, 288); Siggers v. Evans, 5 E. & B. 367; Donaldson v. Donaldson, Kay, 711; *Re* Way's

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Trusts, 2 D. J. & S. 365; Linton *v.* Brown, 20 Fed. Rep. 455, 467 (*semble*); Weber *v.* Christen, 121 Ill. 91 (*semble*); Myrover *v.* French, 73 N. Ca. 609; Wilt *v.* Franklin, 1 Binn. 502; Read *v.* Robinson, 6 W. & S. 329; First Bank *v.* Holmes, 85 Pa. 231. The contrary opinions in Meek *v.* Kettlewell, 1 Hare, 464, and Bridge *v.* Bridge, 16 Beav. 315, that notice to the trustee is essential to the validity of a trust, are overruled.

The same result is reached by the common statement that the assent of the trustee is presumed until the contrary is shown. Wise *v.* Wise, 2 Jon & Lat. 403, 412; King *v.* Phillips, 16 Jur. 1080; Kennedy *v.* Wire, 80 Ala. 165; Howry *v.* Gardner, 41 Oh. St. 642; McKinney *v.* Rhoads, 5 Watts, 343; Eyrick *v.* Hetrick, 13 Pa. 488; Cloud *v.* Calhoun, 10 Rich. Eq. 358; Field *v.* Arrowsmith, 3 Humph. 446; Saunders *v.* Harris, 1 Head, 185. — ED.

[1] Lewin on Trusts, 152; King *v.* Donnelly, 5 Paige, 46.

[2] Backhouse *v.* Backhouse (cited), Lewin on Trusts, 8th ed. 833 n. (b); Wilks *v.* Groom, 6 D. M. & G. 205; Austin *v.* Martin, 29 Beav. 523; Izod *v.* Izod, 32 Beav. 242; Grady *v.* Ibach (Ala., 1891), 10 So. R. 287; Storrs School *v.* Whitney, 54 Conn. 342; Dailey *v.* New Haven, 60 Conn. 314; *Re* Petranek, 79 Iowa, 410; Penny *v.* Davis, 3 B. Mon. 313, 314; Harris *v.* Rucker, 13 B. Mon. 564; Winder *v.* Diffenderfer, 2 Bland, 166, 172; Jones *v.* Stockett, 2 Bland, 409, 435; Thatcher *v.* St. Andrew's Church, 37 Mich. 264, 270; Wilson *v.* Towle, 36 N. H. 129; Adams *v.* Adams, 64 N. H. 224; De Peyster *v.* Clendinning, 8 Paige, 295; McLusker *v.* Brady, 1 Barb. Ch. 329; Burrill *v.* Sheil, 2 Barb. 457; Dunning *v.* Ocean Bank, 6 Lans. 296; *Re* Robinson, 37 N. Y. 261; Sheldon *v.* Chappell, 47 Hun, 59, 63; McLean *v.* Nelson, 1 Jones (N. Ca.), 396; Myrover *v.* French, 73 N. Ca. 609; Read *v.* Robinson, 6 W. & S. 329; First Bank *v.* Holmes, 85 Pa. 231; Ashe *v.* Ashe, Rich. Eq. Cas. 380; Withers *v.* Jenkins, 6 S. Ca. 122; Field *v.* Arrowsmith, 3 Humph. 446; Brevart *v.* Neely, 2 Sneed, 164; Saunders *v.* Harris, 1 Head, 185; Goss *v.* Singleton, 2 Head, 67; Furman *v.* Fisher, 4 Col. 626, 630; Johnson *v.* Roland, 58 Tenn. 203, 211; Walker *v.* Johnson, 37 Tex. 127; Lee *v.* Randolph, 2 Hen. & Munf. 12 *Accord.*

A trustee may disclaim either by deed — Doe *v.* Harris, 16 M. & W. 517; Peppercorn *v.* Wayman, 5 DeG. & Sm. 230 — or by parol. Townson *v.* Tickell, 3 B. & Al. 31; Stacey *v.* Elph, 1 M. & K. 195; Foster *v* Dawber, 1 Dr. & Sm. 172; Birchall *v.* Birchall, 40 Ch. Div. 436; Adams *v.* Adams, 64 N. H. 224; Barritt *v.* Silliman, 13 N. Y. 93; Beekman *v.* Bonsor, 23 N. Y. 298, 305; *Re* Robinson, 37 N. Y. 261; Green *v.* Green, 4 Redf. 357; Read *v.* Robinson, 6 W. & S. 329.

Disclaimer comes too late after conduct indicating acceptance. Conyngham *v.* Conyngham, 1 Ves. 522; Bence *v.* Gilpin, L. R. 3 Ex. 76; Kennedy *v.* Wire, 80 Ala. 165. In Crewe *v.* Dicken, 4 Ves. 97, Lord Loughborough held that a release by a trustee to a co-trustee by way of disclaimer was ineffectual, because the release implied an acceptance of the trust. But Lord Eldon, in Nicholson *v.* Wentworth, 2 Sw. 365, declined to follow this doctrine. See, in confirmation of Lord Eldon, Hussey *v.* Markham, Finch, 258.

If the conveyance is to several trustees and one or more, but less than all, disclaim, the rest are competent, and bound to perform the trust. Bonifant *v.* Greenfield, Cro. El. 80; Smith *v.* Wheeler, 1 Vent. 128, 2 Keb. 774, 1 Lev. 179; Small *v.* Marwood, 9 B. & C. 300; Adams *v.* Taunton, 5 Madd. 435; Cooke *v.* Crawford, 13 Sim. 91; Browell *v.* Read, 1 Hare, 434; Cape *v.* Bent, 9 Jur. 653; Eaton *v.* Smith, 2 Beav. 236; Watson *v.* Pearson, 2 Ex. 581, 594; Peppercorn *v.* Wayman, 5 DeG. & Sm. 230; White *v.* McDermott, 7 Ir. R. C. L. 1; Nicoll *v.* Miller, 37 Ill. 387; Putnam School *v.* Fisher, 30 Me. 523; Ratcliffe *v.* Sangston, 18 Md. 383; Long *v.* Long, 62 Md. 33; Ellis *v.* Boston Co., 107 Mass. 1, 13; Scull *v.* Reeves, 1 Green, Ch. 84; *Re* Stevenson, 3 Paige, 420; King *v.* Donelly, 5 Paige, 46; *Re* Van Schoonhoven, 5 Paige, 559; Jackson *v.* Ferris, 15 Johns. 346; Nills *v.* Stevens, 4 Den. 399; Leggett *v.* Hunter, 19 N. Y.

We think that the decree of the court below was well made, and that it should be

Affirmed.

445; Clemens *v.* Clemens, 60 Barb. 366; Zebach *v.* Smith, 3 Binn. 69; Bailey's Petition, 15 R. I. 60; De Saussure *v.* Lyon, 9 S. Ca. 492.

But if an obligation is executed to two or more obligees upon certain trusts, a disclaimer by one of the obligees will not vest the title to the obligation in the others. The obligation is, therefore, in such a case not enforceable at law. Wetherell *v.* Langston, 1 Ex. 634. But equity would not permit the trust to fail. See Fletcher *v.* Fletcher, 4 Hare, 67. — ED.

Conveyance

Adams executed a deed whereby he gave his premises to Appleton to hold for A's wife. Later Adams was divorced. Ap. refused to execute trust. Held: Eq. wl apt new T.

SECTION XIII.

Notice to the Cestui que Trust.

EMRI CLARK *v.* ANN CLARK AND TRUSTEE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1871

[*Reported in* 108 *Massachusetts Reports,* 522.]

TRUSTEE PROCESS. The defendant was defaulted in the Superior Court, and the Boston Five Cents Savings Bank, who were summoned as trustees, made answer that they had in their possession $628, deposited by Betsey Abbott and credited on their books to her as trustee for the defendant. William H. Carter, administrator of the estate of Betsey Abbott, appeared as claimant. The issue between the plaintiff and the claimant was heard, without a jury, by *Pitman*, J., and reported for the determination of this court substantially as follows.

Betsey Abbott deposited in the bank money belonging to herself, in the name of "Betsey Abbott, trustee for Ann Clark," and afterwards died, having retained the book of deposit until her death, and until then the defendant, who was her half-sister, had no notice of the deposit. A by-law of the bank, which was admitted in evidence against the objection of the plaintiff, provided "that no person shall receive any part of his principal or interest without producing the original book, that such payments may be entered therein."

The plaintiff offered evidence of the intent of Betsey Abbott to create a trust in favor of the defendant; but the judge ruled that, even if such intent were proved, the plaintiff could not recover, and directed judgment for the claimant. If this ruling was correct, judgment was to be entered accordingly, otherwise the case was to stand again for trial.

A. E. Pillsbury, for the plaintiff.

C. P. Judd, for the claimant.

CHAPMAN, C. J. The case of Brabrook *v.* Boston Five Cents Savings Bank, 104 Mass. 228, is decisive of this case.[1] The money

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[1] This seems to be a misconception. In Brabrook *v.* Boston Bank, 104 Mass. 228, no real trust was intended, the deposit being nominally in trust solely for the purpose of evading a by-law of the bank which limited the amount of the deposits to the credit of any one person. The case in this respect is the same as Field *v.* Lonsdale, 13 Beav. 78; Powers *v.* Provident Inst., 124 Mass. 377; Jewett *v.* Shattuck, 124 Mass. 590; Parkman *v.* Suffolk Bank, 151 Mass. 218; Bartlett *v.* Remington, 59 N. H. 364; Weber *v.* Weber (N. Y. S. C. 1879), 21 Alb. L. J. 51; and Markey *v.* Markey (N. Y. C. P.), 13 N. Y. Sup. 925. See also Smith *v.* Speer, 34 N. J. Eq. 336.

The principal case runs counter also to another class of cases. If a donor, instead of taking an obligation in his own name in trust for the donee, takes it in the name of originally belonged to Betsey Abbott, and was deposited in the bank by her; and though she deposited it in the name of "Betsey Abbott, trustee of Ann Clark," yet she retained the book of deposit, and gave Ann Clark no notice of what she had done, nor did she know it till after Betsey Abbott's death. By one of the by laws of the bank, no one could draw any part of the money without producing the bank-book. Even if the plaintiff could prove that she intended to create a trust, she did not do what was necessary to carry the intent into effect. Ann Clark was not a party to the transaction, and never acquired any title to the money; and upon the death of Betsey Abbott it passed to her administrator. *Judgment for the claimant.*[2]

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the donee, the gift is complete and irrevocable, notwithstanding the donee's ignorance of the transaction. Standing *v.* Bowring, 31 Ch. Div. 282, 27 Ch. D. 341 (shares); Holliday *v.* Lewis, 14 Hun, 478 (note); Beaver *v.* Beaver, 62 Hun, 194 (bank deposit); Smith *v.* Bank of Washington, 5 S. & R. 318 (shares); Read *v.* Roberts, 85 Pa. 84 (shares); Langdon *v.* Allen, 1 W. N. (Pa.) 395 (note); Scott *v.* Dickson, 108 Pa. 6 (*semble*, insurance policy); Howard *v.* Windham Bank, 40 Vt. 597 (bank deposit).

But see, *contra*, Ide *v.* Pierce, 134 Mass. 260 (*semble*, bank deposit); Sherman *v.* New Bedford Bank, 138 Mass. 581 (bank deposit); Scott *v.* Berkshire Bank, 140 Mass. 157 (*semble*, bank deposit); Branch *v.* Dawson, 36 Minn. 193 (bank deposit); and compare Blasdel *v.* Locke, 52 N. H. 238; Smith *v.* Savings Bank, 64 N. H. 228, 231.

A trust created after the analogy of a feoffment to uses, i. e. by vesting a title in one person in trust for another, is valid and irrevocable, without regard to the knowledge or ignorance of the *cestui que trust*. Clavering *v.* Clavering, 2 Vern. 473; Smith *v.* Lyne, 2 Y. & C. C. C. 345; Fletcher *v.* Fletcher, 4 Hare, 67; Paterson *v.* Murphy, 11 Hare, 88; Tate *v.* Leithead, Kay, 658; *Re* Way's Trusts, 2 D. J. & S. 365; Minot *v.* Tilton, 64 N. H. 371; Gulick *v.* Gulick, 39 N. J. Eq. 401; Meiggs *v.* Meiggs, 15 Hun, 453; Van Cott *v.* Prentice, 104 N. Y. 45; Wadd *v.* Hazleton, 62 Hun, 602.

It is hardly necessary to cite the following cases, showing that a trust once created is irrevocable. Petre *v.* Espinasse, 2 M. & K. 496; Bill *v.* Cureton, 2 M. & K. 503; Rycroft *v.* Christy, 3 Beav. 238; Evans *v.* Jennings, 6 W. R. 616; Andrews *v.* Hobson, 23 Ala. 219; Hellman *v.* McWilliams, 70 Cal. 449; Gordon *v.* Green, 10 Ga. 534; McDonald *v.* Starkey, 42 Ill. 442; Massey *v.* Huntington, 118 Ill. 80; Gaylord *v.* Lafayette, 115 Ind. 423; Wright *v.* Moody, 116 Ind. 175; Ewing *v.* Jones, Ind. (1892), 29 N. E. R. 1057; Riddle *v.* Cutter, 49 Iowa, 547; Butler *v.* Miller, 15 B. Mon. 617, 626; Viney *v.* Abbot, 109 Mass. 300; Sewall *v.* Roberts, 115 Mass. 262, 274; *Re* Thurston, Mass. (1891), 29 N. E. R. 53; Ewing *v.* Warner, Minn. (1891), 50 N. W. R. 603; Minot *v.* Tilton, 64 N. H. 371; Isham *v.* Delaware Co., 3 Stock. 227; Gulick *v.* Gulick, 39 N. J. Eq. 401; Crue *v.* Caldwell, 52 N. J. 215; Beekman *v.* Hendrickson, N. J. Eq. (1891), 21 Atl. R. 567; Fellows *v.* Heermans, 4 Lans. 230; Meiggs *v.* Meiggs, 15 Hun, 453; Mabie *v.* Bailey, 95 N. Y. 206; Wallace *v.* Berdell, 97 N. Y. 13; McPherson *v.* Rollins, 107 N. Y. 316; Cressman's Ap., 42 Pa. 147; Fellow's Ap., 93 Pa. 470; Solms *v.* Phila. Co., 16 W. N. (Pa. C. P.) 80; Murphy *v.* Solms, 6 Pa. Co. R. 264; Eaton *v.* Tillinghast, 4 R. I. 276; Barber *v.* Thomson, 49 Vt. 213; Sargent *v.* Baldwin, 60 Vt. 17; Howard *v.* Howard, 60 Vt. 362; Brown *v.* Cavendish, 1 J. & Lat. 606, 637. — Ed.

[2] Stone *v.* Bishop, 4 Cliff. 593; Cummings *v.* Bramhall, 120 Mass. 554; Gerrish *v.* New Bedford Institution, 128 Mass. 159, 162 (*semble*); Alger *v.* North End Bank, 146 Mass. 418, 422 (*semble*) *Accord.*

Forbes *v.* Forbes, 30 Law Times, 176 (*semble*); Middleton *v.* Pollock, 2 Ch. D. 104; Minor *v.* Rogers, 40 Conn. 512; Smith *v.* Darby, 39 Md. 268; Witzel *v.* Chapin, 3 Bradf. 386; Smith *v.* Lee, 2 Th. & C. 591; Martin *v.* Funk, 75 N. Y. 134; Willis *v.* Smyth, 91 N. Y. 297; Mabie *v.* Bailey, 95 N. Y. 206; Anderson *v.* Thomson, 38 Hun,

50 A. J. E.
88 Me. 9
64 Vt. 5

394; Scott *v.* Harbeck, 39 Hun, 292; *Re* Collyer, 4 Dem. 24; *Re* Smith, 144 Pa. 428; *Re* Gaffney, 146 Pa. 49 *Contra.*

In Martin *v.* Funk, *supra*, Church, C. J., delivering the opinion of the court, said, p. 139: "But the Supreme Court of Massachusetts in two cases, Brabrook *v.* Five Cents Savings Bank (104 Mass. 228), and Clark *v.* Clark (108 id. 522), seem to hold a different doctrine. In the first case the circumstances were deemed controlling, adverse to an intent to create a trust, and in the last, which was similar in its facts to this, the court express the opinion that the trust was not complete, but without giving any reasons for the opinion. The last decision, although entitled to great respect, is exceptional to the general current of authority in this country." In Beaver *v.* Beaver, 53 Hun, 258, Learned, P. J., said, p. 259: "And we must notice, in regard to Massachusetts cases, that Martin *v.* Funk is not in harmony with Massachusetts decisions. But it is our law, and it is thoroughly sound common sense, like everything else which came from the learned judge who wrote the opinion." — ED.

A deposit by one in his own name as trustee for another standing alone does not create an irrevocable trust during the life time of the depositor; it is a tentative trust revocable at will until the depositor dies or completes his gift in his life time by an unequivocal act or declaration such as the delivery of the pass-book or notice to the beneficiary. — 179 N.Y. A.D. 112; 107 N.Y. A.D. 393 (subject-matter of trust both deposits and shares of stock); 107 N.Y. A.D. 331; 114 N.Y.A.D. 393 117 N.Y.A.D. 178; 122 N.Y. A.D. 68

If the depositor does not revoke the trust or use up the deposit in his life time, the trust stands. — 120 N.Y.A.D. 225; 101 Md. 194.

If the depositor gives the bank-book to the beneficiary as a gift, the trust is irrevocable. 119 N.Y.A.D. 35.

CHAPTER II.

THE NATURE OF THE CESTUI QUE TRUST'S INTEREST.

SECTION I.

His Claim is purely Equitable, except when Account would lie at Common Law.

MEGOD'S CASE.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1585.

[*Reported in* 4 *Leonard*, 225.[1]]

A. enfeoffed B. to the intent that B. should convey the said land to such person as A. should sell it. A sold it to C., to whom B. refused to convey the land; and thereupon he brought an action upon the case against B. And by WRAY Chief Justice and GAWDY Justice here is a good consideration, for here is a trust, and that which is a good consideration in the Chancery is in this case sufficient. SHUTE Justice was of a contrary opinion, and afterwards judgment was given for the plaintiff.[2]

Probo
C, posse
A.

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[1] Godb. 64, s. c. — ED.

[2] In Butler *v.* Butler (1657), 2 Sid. 21, it is said: "If one devises that his heir shall pay such a sum, for default of payment an action on the case lies. For a breach of promise or breach of trust is a proper ground of an action in the case." In Jevon *v.* Bush (1685), 1 Vern. 342, 344, it is reported that Lord Jeffries, C., "cited my Lord Hobart, who says that *cestui que trust* in an action on the case against his trustee shall recover for a breach of trust in damages." See also 1 Eq. Ab. 384, D, n. (a). In Smith *v.* Jameson, 5 T. R. 601, Buller, J. said, p. 603: "With regard to the other point made, that a breach of trust may not be the ground of an assumpsit, there is not an abridgment in the law which does not contradict such a proposition." See also Bennett *v.* Preston, 17 Ind. 291; Newhall *v.* Newhall, 7 Mass. 198.

But see Forde *v.* Hoskins (1615), 1 Rolle, 125. Coke, C. J.: "If *cestui que use* at common law requested his feoffees to make a feoffment to J. S., and they refused, no action upon the case would lie, *quod fuit concessum per Curiam*, but the sole remedy is in Chancery." See 2 Bulst. 336, 337, s. c. To the same effect is Turner *v.* Sterling (1671), Freem. 15. "Per Curiam. An action on the case will not lie against feoffees in trust if they will not convey; but the proper remedy is by subpœna." In Barnadiston *v.* Soame (1676), 6 How. St. Trials, 1063, Lord North, C. J. said, p. 1098: "No action upon the case will lie for breach of a trust, because the determination of the

HOLLAND *v.* HOLLAND.

CHANCERY, BEFORE SIR C. J. SELWYN AND SIR G. M. GIFFARD, L. JJ., APRIL 24, 1869.

[*Reported in* 4 *Chancery Appeals,* 449.]

THE question on this appeal was whether money due from the estate of a trustee in consequence of a breach of trust by him was a specialty debt.

Henry Clarke, who died in December, 1856, devised his real estate to Joseph Clayton and Bartholomew Clayton, upon trust for his wife for life, and after her death upon certain other trusts. And the testator declared that if either of the trustees died or became unwilling to act, then it should be lawful for the surviving or continuing trustee, to nominate any fit person or persons to supply the place or places of such trustees or trustee.

By an indorsed indenture, dated the 10th of December, 1859, after reciting the death of the co-trustee, and that B. Clayton had proposed to appoint Frederick Cooke, and that Frederick Cooke had consented and agreed to become such trustee, as he did thereby testify and declare, it was witnessed that Clayton did thereby nominate and appoint Frederick Cooke to be trustee in the room of the deceased trustee, "and the said Frederick Cooke doth hereby testify and declare his acceptance of the trusteeship."

Facts

which he accepted the trusteeship. This was enough to
make it a specialty debt

Bartholomew Clayton died in 1866, after which F. Cooke appeared to have possessed himself of the trust estate under the will, and to have misapplied it. He died in 1867, and a creditors' suit was instituted for the admininistration of his estate. New trustees had been appointed under the will of H. Clarke, and they carried in a claim against the estate of F. Cooke for £4,695 principal and £320 interest. The claim was not disputed, and the only question raised was whether it was a specialty debt or a simple contract debt. The Vice Chancellor Stuart, on a motion to vary the certificate of his chief clerk, held the debt to be a specialty debt, and made an order accordingly.[1]

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principal thing, the trust, does not belong to the common law, but to the Court of Chancery." In Sturt *v.* Mellish, 2 Atk. 610, Lord Hardwicke, C. said, p. 612: "A trust is where there is such a confidence between the parties that no action at law will lie; but is merely a case for the consideration of this court." See further the emphatic statement of Stuart, V. C., in Holland *v.* Holland, 4 Ch. 448, 451: "Except in an exploded *dictum* of Lord Hobart, who said that a *cestui que trust* might bring an action at law for a breach of trust, there is no authority and no principle to support the notion that the equitable obligation of a trustee to perform a trust, whether created by will, or writing not under seal, or by declaration of trust under seal, makes the *cestui que trust* his creditor either by specialty or simple contract." — ED.

[1] The statement of the case has been abridged, and the arguments of counsel, as well as the concurring opinion of Giffard, L. J., are omitted. — ED.

The parties to the administration suit now moved by way of appeal that the order of the Vice Chancellor might be discharged.

Mr. C. Hall and *Mr. Speed*, for the appellants.

Mr. Dickinson, Q. C., and *Mr. Davey*, for the trustees of the will.

SIR C. J. SELWYN, L. J. The first question which arises in this case is, whether the deed of the 10th of December, 1852, by which the testator, whose estate is being administered in this suit, was appointed trustee, is to be construed as containing nothing more than an appointment of the testator to a certain trusteeship, and an acceptance by him of that trusteeship, or is to be construed as containing a covenant, or words equivalent to a covenant, on his part, to do some special act, or to perform some duty. It has been argued that, as the acceptance of the trust is twice referred to in the deed, it must be construed as if something more than a mere acceptance of the trust was intended, or must be implied; and if that acceptance had been twice referred to in the recital, or twice in the operative part of the deed, there would have been considerable force in that argument. But in this recital one thing is referred to as a thing proposed to be done, and then, according to the usual form adopted by conveyancers, the same thing is witnessed to have been done by the operative part of the deed. I think that both the recital and the operative part have one and the same object and effect, namely, the appointment to the trusteeship on the one hand, and the acceptance of it on the other, but that here is no express covenant to do any special act, or to perform any duty, and I think that no such covenant can be implied. The cases of Courtney *v.* Taylor [1] and Marryat *v.* Marryat [2] are authorities in support of this conclusion.

Assuming, then, this to be the true construction of the deed, the next and the only remaining question is, whether, in consequence of the acceptance of the trusteeship by an instrument under seal, the present debt, and, as the argument has been properly and necessarily put, every other debt which could be proved against this estate in respect of this trusteeship, ought to be considered as a specialty debt. In my judgment this question is concluded by authority. The case of Adey *v.* Arnold [3] was decided by Lord St. Leonards in 1852, when sitting in the Court of Appeal, and it therefore possesses, as I need not say, very great weight. In that case the deed was executed by the trustee, which, in my judgment, clearly amounted to an acceptance under seal by him of the trust; and that decision, so far as I know, has never since been questioned. Even in the present case the learned Vice Chancellor has not in any degree impugned the authority of Adey *v.* Arnold, for his Honor appears to have been misinformed upon a matter of fact, and to have supposed that in the case of Adey *v.* Arnold the deed was not executed by the trustee; and but for that misapprehension I think it probable that his Honor's decision would have been different. On the other hand, the decision in Adey *v.* Arnold has been followed by Vice Chancellor Kindersley in the case of Wynch *v.* Grant,[1] by the Lord Chancellor of Ireland in Newport *v.* Bryan,[2] and by Lord Cairns in the case of Isaacson *v.* Harwood.[3] I think that the case of Wood *v.* Hardisty [4] cannot be considered as an interruption to the line of authorities, nor as in any degree questioning the authority of Adey *v.* Arnold,[5] for in that case there was an express declaration that, "subject to the trust aforesaid, the said William Forbes, his executors, administrators, and assigns, shall stand possessed of the said policies of assurance, and of the moneys, bonuses, and accumulations to be received in respect thereof, and of all other the premises hereby assigned, or intended so to be, upon trust for the said Susan, her executors, administrators, and assigns," and in any case, as a previous decision by a Vice Chancellor, it must be treated as subordinate in point of authority to the subsequent decision of the Lord Chancellor sitting in the Court of Appeal. We may, therefore, take it that since the decision of Adey *v.* Arnold there has been a stream of authorities flowing in the same direction, never in any way interrupted or questioned.

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[1] 7 Scott, N. R. 749; 6 Man. & G. 51.

[2] 28 Beav. 224.

[3] 2 D. M. & G. 432; 16 Jur. 1123.

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I think, both upon principle and upon authority, the mere fact of a trustee being a party to and executing a deed by which he is appointed trustee and accepts the office, is not of itself sufficient to justify the Court in holding that a debt of such a character as that now before us is a specialty debt.

The order of the learned Vice Chancellor should, therefore, be discharged.[6]

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[1] 2 Drew. 312; 18 Jur. 1010.

[2] 5 Ir. Ch. Rep. 119.

[3] Law Rep. 3 Ch. 225.

[4] 2 Col. 542; 10 Jur. 486.

[5] 2 D. M. & G. 432.

[6] Bartlett *v.* Hodgson, 1 T. R. 42; Adey *v.* Arnold, 2 D. M. & G. 432; Richardson *v.* Jenkins, 1 Drew. 477 (*semble*); Wynch *v.* Grant, 2 Drew. 312; Isaacson *v.* Harwood, 3 Ch. 225; Newport *v.* Bryan, 5 Ir. Ch. 119; Green *v.* Brooks, 25 Ark. 318 (*semble*); Benbury *v.* Benbury, 2 Dev. & B. Eq. 235 (*semble*).

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In the following cases the court, finding evidence of an actual agreement to perform the trusts, adjudged the trustee to be a specialty debtor. Gifford *v.* Manley, Cas. t. Talbot, 108; Mavor *v.* Davenport, 2 Sim. 227; Turner *v.* Wardle, 7 Sim. 80; Cummins *v.* Cummins, 3 J. & Lat. 64; Wood *v.* Hardisty, 2 Coll. 542. accord.

Although the action of account was the normal remedy in the case of what may be called common law trusts as distinguished from purely equitable trusts, an action of covenant could also be brought against a bailiff or factor who by deed agreed to render a true account. Hawkins *v.* Parker, 2 Bulst. 256, 1 Rolle R. 52; Barker *v.* Thorold, 1 Saund. 47; Wilkins *v.* Wilkins, Comb. 149; Spurraway *v.* Rogers, 12 Mod. 517. — ED.

WILLIAM T. NORTON *v.* ANN S. RAY, EXECUTRIX.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY, 1885.

[*Reported in* 139 *Massachusetts Reports*, 230.]

CONTRACT, against the executrix of the will of Isaiah C. Ray, for money had and received. Writ dated May 12, 1883.

Trial in the Superior Court, without a jury, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that, on December 27, 1865, Isaiah C. Ray, the defendant's testator, bought at the plaintiff's request, with the plaintiff's funds, and for his benefit, a dwelling-house and lot in Edgartown, and received a deed of it, running to himself and his heirs, without disclosing any trust. On January 2, 1866, Ray executed and delivered to the plaintiff the paper, a copy of which is annexed to the declaration. [This paper was a declaration of trust of the premises in question in favor of the plaintiff.]

On November 1, 1869, Ray executed a deed of this lot to the plaintiff's wife "during her natural life, if she remains unmarried." Ray sent this deed to the plaintiff's wife at Edgartown. She took the deed, got it recorded, and paid for recording it.

The plaintiff had no knowledge or information of the making of said deed until a short time before the commencement of this action, and did not authorize it in any way. At the time it was made, his wife lived apart from him, and has done so ever since. There was no evidence how or by whom the property was occupied or managed prior to that, but the plaintiff's wife has continuously resided upon it since. At one time, it did not appear when, Ray offered the plaintiff's landlady a sum of money, if she would get and bring to him the declaration of trust, without the plaintiff's knowing it.

The plaintiff claimed to recover, as damages, the value, at the date of the writ, of the estate conveyed by the deed to his wife. The judge found this to be $278.85, and found for the defendant; and at the plaintiff's request, and with the defendant's consent, reported the case to this court for its opinion upon the questions of law involved.

If, as matter of law, upon the foregoing facts, the plaintiff was entitled to recover, judgment was to be entered in his favor for $278.85, and interest thereon from the date of the writ, or such other order to be made as law and justice might require; otherwise, judgment for the defendant.[1]

H. M. Knowlton, for the plaintiff.

F. A. Milliken, for the defendant.

W. ALLEN, J. The plaintiff's only remedy is in equity. The case discloses a trust, and cannot be brought within the decisions in which

received for value of land. Held: its remedy is in Equity.

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[1] The reporter's statement has been somewhat abridged. — ED.

it has been held that an action for money had and received will lie against a trustee by a *cestui que trust* to recover a liquidated sum due to him under the trust.[1] *Judgment for the defendant* [2]

ANONYMOUS.

IN THE COMMON PLEAS, EASTER TERM, 1464.

[*Reported in Year Book,* 4 *Edward IV., folio* 7, *placitum* 9.]

IN a writ of trespass *quare vi et armis clausum suum fregit*, &c., *et arbores succidit*, &c., *et herbas conculcavit et consumpsit*, &c.

Catesby. You should have no action, for we say that a long time before the supposed trespass one J. B. was seised of certain land, &c., the place where, &c., in fee, and being so seised enfeoffed the plaintiff thereof in fee to the use of the defendant, &c., upon confidence, and afterwards the defendant by the sufferance and will of the plaintiff occu-

+ Cut down trees, etc., this is trespass.

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[1] Johnson *v.* Johnson, 120 Mass. 465, and cases cited; Davis *v.* Coburn, 128 Mass. 377.

[2] Hukill *v.* Page, 6 Biss. 183; Davis *v.* Coburn, 128 Mass. 377; Kendall *v.* Kendall, 60 N. H. 527 (*semble*); Bishop *v.* Houghton, 1 E. D. Sm. 566; Cearnes *v.* Irving, 31 Vt. 604 *Accord.* In Hukill *v.* Page, *supra*, where the trustee of a bond wrongfully released the obligor, Blodgett, J., said: "Inasmuch as no fraud was charged, but negligence only is alleged in the declaration, the remedy should be by a bill in chancery. It is possible that an action on the case might lie against the trustees if fraud were alleged."

The Ecclesiastical Court had no jurisdiction against a trustee, *Ex parte* Jenkins, 1 B. & C. 655; Barker *v.* May, 4 M. & Ry. 386.

Formerly, when there was no chancery jurisdiction in Massachusetts, a *cestui que trust* was allowed to sue the trustee in *assumpsit* and recover damages for a breach of trust. Newhall *v.* Wheeler, 7 Mass. 189, 198; Arms *v.* Ashley, 4 Pick. 71, 73. In Pennsylvania, under similar conditions, the courts went much further, not only permitting the *cestui que trust* to maintain *assumpsit*, but also to obtain in the common-law action the relief properly attainable only by a bill in equity. Martzell *v.* Stauffer, 3 Pa. 398; Aycinena *v.* Peries, 6 Watts & S. 243, 258. It may be added that a legacy, which was properly recoverable only in the spiritual court, could be collected during the Commonwealth, when there were no spiritual courts, by an action on the case at common law. Nicholson *v.* Sherman, 1 Sid. 45.

As a bill in equity was the normal remedy in the case of equitable trusts, so the action of account was the original and normal remedy in the case of the common-law trust. But in the time of Lord Holt an action of special *assumpsit* was admitted against a factor or bailiff who had expressly promised to render an account. Wilkins *v.* Wilkins (1689) Comb. 149, Carth. 89, 1 Show. 71, Holt, 6, 1 Salk. 9, s. c.; Spurraway *v.* Rogers (1701) 12 Mod. 517. In the latter case Lord Holt said: "If one receive goods of another and expressly promise to be accountable for them, or to give an account of them, case will lie, if he will not account, upon that promise; but upon a general bailment of goods, without a particular promise to account, there the sole remedy is by account." Afterwards the requisite of an express promise appears to have been dispensed with. At all events special *assumpsit* was maintained in Topham *v.* Braddick, 1 Taunt. 572; Tomkins *v.* Willshear, 5 Taunt. 430; Owston *v* Cole, 13 East, 538; Croskey *v.* Miles, 1 C. M. & R. 298; Edgell *v.* Day, L. R. 1 C. P. 80. But such actions were rare because of the competing jurisdiction of equity. — ED.

pied this land and cut trees upon the same and trampled the grass, which is the same trespass, &c.

Jenney. This is no plea, for there is no certain matter, for such sufferance and will cannot be tried; and in such case to make a good issue or traversable matter, he should plead a lease by the plaintiff to the defendant to hold at will, which is traversable and may be tried.

Catesby. Why shall he not plead this matter when it follows reason that the defendant enfeoffed the plaintiff to the defendant's use, and so the plaintiff is in reason in this land only to the defendant's use, and the defendant made the feoffment upon trust and confidence, and the plaintiff suffered the defendant to occupy the land, so that in reason the defendant occupied at his will,[1] which proves that the defendant shall therefore have the advantage of pleading the feoffment in trust to justify the occupation, &c.

MOYLE, J. This would be a good matter in the chancery, for the defendant there shall plead the intent and purpose upon such feoffment, for by conscience one shall have remedy in the chancery, according to the intent of such a feoffment; but here by the common law in the Common Bench or King's Bench it is different, for the feoffee shall have the land, and the feoffor shall not justify against his own feoffment, whether the feoffment was upon confidence or not.

Catesby. The law of chancery is the common law of the land, and if there the defendant shall have advantage of such a feoffment, why not likewise here?

MOYLE, J. That cannot be in this court as I have told you, for the common law of the land varies in this case from the law of chancery, &c.

WEAKLY, ON THE DEMISE OF YEA, BART., *v.* ROGERS.

IN THE EXCHEQUER CHAMBER, MICHAELMAS TERM, 1789.

[*Reported in* 5 *East*, 138, *note* (*a*).]

SIR WILLIAM YEA had agreed, about seven years before, with the defendant to grant him, in consideration of a certain sum which was paid, a lease for his own and his son's life; and the defendant, on the faith of that agreement, had entered into possession and built a house on the premises. After which Sir William (not having executed any lease) gave the defendant six months' notice to quit, considering him as tenant from year to year, and brought this ejectment. The case was argued in this court in Trinity Term, 29 Geo. III.; when the court, after taking time to consider, and (as it was understood) not being agreed in opinion, directed the case to be argued before all the judges in the Exchequer Chamber; which argument took place in Michaelmas Term, 30 Geo. III., when a second argument was awarded, but the case was never brought before the judges again. [*Vide* 7 Term Rep. 51.] But, as I collected at the time, Lord Loughborough, C. J., Gould, Ashhurst, and Buller, JJ., were of opinion that the defendant's equitable title might be set up as a defence to the ejectment. Lord Kenyon, C. J., Eyre, C. B., and Heath, J., were decidedly of a different opinion: and with these it is probable that the other judges coincided; though I have no authority for saying so; and no public opinion was ultimately delivered on the case. But that an equitable title cannot be set up in ejectment has ever since been considered as settled.[1]

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[1] A *cestui que trust* in possession of the land by the permission of the trustee was treated as a tenant at will under the statutes 3 & 4 Wm. IV. c. 27, § 2. Garrard *v.* Tuck, 8 C. B. 231, 251–254 (explaining Doe *v.* Phillips, 10 Q. B. 130). Compare Melling *v.* Leake, 16 C. B. 652. — ED.

[1] Roe *v.* Lowe, 1 H. Bl. 446; Doe *v.* Wharton, 8 T. R. 2; Roe *v.* Reade, 8 T. R. 122; Doe *v.* Wroot, 5 East, 132; Doe *v.* Phillips, 10 Q. B. 130 (*semble*); Neave *v.* Avery, 16 C. B. 328; Drake *v.* Pywell, 4 H. & C. 78 (*semble*); Allen *v.* Walker, L. R. 5 Ex. 187; Watkins *v.* Holman, 16 Pet. 25; Hickey *v.* Stewart, 3 How. 750; U. S. *v.* King, 7 How. 833, 847; Greer *v.* Mezes, 24 How. 268, 275; Singleton *v.* Touchard, 1 Black, 342; Foster *v.* Mora, 98 U. S. 425; Steel *v.* Smelting Co., 106 U. S. 447, 452; Johnson *v.* Christian, 128 U. S. 374; Marshall *v.* Ladd, 131 U. S. App. lxxxix; Lerma *v.* Stevenson, 40 F. R. 356; Hawkins, Wills, 49 F. R. 506; Mitchell *v.* Robertson, 15 Ala. 412; Gunn *v.* Barrow, 17 Ala. 743; Childress *v.* Monette, 54 Ala. 317; Tutwiler *v.* Munford, 73 Ala. 308; Standifer *v.* Swann, 78 Ala. 88; Hooper *v.* Columbus Co., 78 Ala. 213; Woods *v.* Montevallos Co., 84 Ala. 561; Reece *v.* Allen, 10 Ill. 236, 241 (*semble*); Wales *v.* Bogue, 31 Ill. 464; Page *v.* Cole, 6 Iowa, 153; Stinebaugh *v.* Wisdom, 13 B. Mon. 467; Matthews *v.* Ward, 10 Gill & J. 443; Russell *v.* Lewis, 2 Pick. 508; Crane *v.* Crane, 4 Gray, 323; Fitzpatrick *v.* Fitzgerald, 13 Gray, 400; Essex Co. *v.* Durant, 14 Gray, 447; Phelps *v.* Townsley, 10 All. 554; Moody *v.* Farr, 33 Miss. 192. (compare Lockhart *v.* Camfield, 48 Miss. 470, 485); Brown *v.* Combs, 5 Dutch. 36 (*semble*); Commissioners *v.* Johnson, 36 N. J. Eq. 211; Mulford *v.* Tunis, 35 N. J. 256; Jackson *v.* Chase, 2 Johns. 84; Jackson *v.* Pierce, 2 Johns. 221; Jackson *v.* De Yo, 3 Johns. 422; Jackson *v.* Van Slyck, 8 Johns. 487; Sinclair *v.* Jackson, 8 Cow. 543; Moore *v.* Spellman, 5 Den. 225 (overruling Jackson *v.* Bateman, 2 Wend 570; Jackson *v.* Leggett, 7 Wend. 377); Den. *v.* Troutman, 7 Ired. 155; Starke *v.* Smith, 5 Oh. 455; Moore *v.* Burnet, 11 Ohio, 334; Langford *v.* Love, 3 Sneed, 308 (*semble*); Beach *v.* Beach, 14 Vt. 28; Cearnes *v.* Irving, 31 Vt. 604, 606; Taylor *v.* King, 6 Munf. 358; Hopkins *v.* Stephens, 2 Rand, 422 *Accord.*

Warren *v.* Ireland, 29 Me. 62; Sawyer *v.* Skowhegan, 57 Me. 500; French *v.* Patterson, 61 Me. 203; Blake *v.* Collins, 69 Me. 156 (conf. Cary *v.* Whitney, 48 Me. 516; and Jewell *v.* Harding, 72 Me. 124); Brown *v.* Weast, 8 Miss. 181; Heard *v.* Baird, 40 Miss. 793, 799 (*semble*); Scoby *v.* Blanchard, 3 N. H. 170; Edes *v.* Herrick, 61 N. H. 60 *Contra.*

In Doe *v.* Wroot, *supra*, Lord Ellenborough, C. J., said, p. 138: "We can only look to the legal estate, and that is clearly not in the devisees, but in the heir-at-law of the surrenderor; and if the devisees have an equitable interest, they must claim it elsewhere, and not in a court of law. For as to the doctrine that the legal estate cannot be set up at law by a trustee against his *cestui que trust*, that has been long repudiated, ever since a case which was argued in the Exchequer Chamber some years ago."

In many jurisdictions a *cestui que trust* may, at the present day, defeat an action of ejectment brought by the trustee by a statutory equitable plea. 36 & 37 Vict. c. 66. § 24, Lewin, Trusts (9 ed.) 762. Morrison *v.* Wilson, 13 Cal. 494; Willis *v.* Wozencraft, 22 Cal. 607; Love *v.* Watkins, 40 Cal. 547; Kenyon *v.* Quin, 41 Cal. 325; Talbert *v.* Hoppin, 42

Cal. 390; Tyler *v.* Granger, 48 Cal. 259; De Arguello *v.* Bours, 67 Cal. 447; Meeker *v.* Dalton, 75 Cal. 154; Wallace *v.* Maples, 79 Cal. 432 (*semble*); Suessenbach *v.* First Bank, 5 Dak. 477; Walls *v.* Endel, 20 Fla. 86 (see Petty *v.* Mays, 19 Fla. 652); Morgan *v.* Marshall, 62 Ga. 401; Petty *v.* Malier, 15 B. Mon. 591; Morton *v.* Dickson (Ky. 1890), 14 S. W. R. 531, 905; Barrett *v.* Hinckley, 124 Ill. 32; (but see McGinnis *v.* Fernandes, 126 Ill. 228;) Rosierz *v.* Van Dan, 16 Iowa, 175; Van Orman, 16 Iowa, 186; Kramer *v.* Conger, 16 Iowa, 434; Penny *v.* Cook, 19 Iowa, 538; Shawhan *v.* Long, 26 Iowa, 488; McClane *v.* White, 5 Minn. 178; Douthitt *v.* Stinson, 73 Mo. 199; Preston *v.* Ricketts, 91 Mo. 320 (*semble*); Tibran *v.* Tibran, 19 Mo 78; Carman *v.* Johnson, 20 Mo. 108; Hayden *v.* Stewart, 27 Mo. 286; Hams *v.* Vinyard, 42 Mo. 568; Barker *v.* Circle, 60 Mo. 258; Collins *v.* Rogers, 63 Mo. 515; Gibson *v.* Chouteau, 13 Wall. 92, 103 (Mo. case); Sebree *v.* Patterson, 92 Mo. 451, 458 (citing Mo. cases); Allen *v.* Logan, 96 Mo. 591, Lamme *v.* Dodson, 4 Mont. 560; Stith *v.* Lookabill, 76 N. C. 465; Dempsey *v.* Rhodes, 93 N. C. 120; Crane *v.* Goodman, 12 N. Y. 266; Bartlett *v.* Judd, 21 N. Y. 200, Coralli *v.* Allen, 57 N. Y. 508; Hoppough *v.* Struble, 60 N. Y. 430; Shattuck *v.* Bascom, 105 N. Y. 39; Dewey *v.* Hoag, 15 Barb. 365; Stone *v.* Sprague, 20 Barb. 517; Cythe *v.* Le Fontain, 51 Barb. 186; Powers *v.* Armstrong, 36 Oh. St. 357; Wylie *v.* Mausley, 132 Pa. 65; Davis *v.* Teays, 3 Grat. 283; Lombard *v.* Cowham, 34 Wis. 486; Du Pont *v.* Davis, 35 Wis. 631; Ingles *v.* Patterson, 36 Wis. 373; Cornelius *v.* Kessel, 128 U. S. 456 (Wisconsin case).

In certain jurisdictions, by an anomaly, a *cestui que trust* has been allowed to defeat the trustee without the aid of a statute. Sloan *v.* Petrie, 16 Ill. 262; Stow *v.* Russell, 36 Ill. 18; Staley *v.* Murphy, 47 Ill. 241; Chicago Co. *v.* Hay, 119 Ill. 493 (explaining Finlon *v.* Clark, 118 Ill. 32); Godson *v.* Beacham, 24 Ga. 150, 154 (*semble*); Helms *v.* O'Bannon, 26 Ga. 132, 137.

A trustee of a chattel, as well as a trustee of land, may recover the property from the *cestui que trust*, or damages for its conversion, in an action at law. Gunn *v.* Barrow, 17 Ala. 743; Newman *v.* Montgomery, 6 Miss. 742; Guphill *v.* Isbell, 8 Rich. 463, 1 Bail. 230; except in jurisdictions allowing equitable pleas, Bowen *v.* Bowen, 19 Mo. 399.

Conversely the *cestui que trust* of a chattel cannot recover it from the trustee, Redwood *v.* Riddick, 4 Munf. 222. — ED.

A contracted to lease to R & B entered. A failed & A's brought ejectment Held: B's eqtbl ttl no defence to Ejectment.

SECTION II.

Cestui que Trust is a claimant against the Trustee — not the owner of the Trust-res.

(*a*) HIS CLAIM IS ENFORCEABLE REGARDLESS OF THE SITUS OF THE TRUST-RES.

THE EARL OF KILDARE *v.* SIR M. EUSTACE.

IN CHANCERY, BEFORE LORD JEFFREYS, C., NOVEMBER 8, DECEMBER 3, 1686.

[*Reported in* 1 *Vernon*, 405, 419.]

THE plaintiff's bill was to be relieved touching the trust of certain lands in Ireland. The defendants had appeared and answered the bill, and had not any way objected to the jurisdiction of this court: but the cause coming now to be heard, the Lord Chancellor objected, this court could not hold plea of lands in Ireland.

For the plaintiff it was urged, that he was proper for relief in this court by reason that both plaintiff and defendant were here in England, and that a court of equity does only *agere in personam ;* its proceedings are to reform the conscience of the party, and if at any time a court of equity may be said to *agere in rem*, it is only in the case of sequestration, which is for the contempt of the party; and that therefore the defendant being served with a subpœna here, and living in England, this court had proper jurisdiction of the cause, though the land lies in Ireland; and the rather, for that it was never yet pretended that there was any local action in equity: and they instanced for precedents the late cases of the Lord Arglasse and Muschamp,[1] and Lord Arglasse and Pit, and Archer's Case,[2] and insisted that otherwise there would be a failure of justice, for the defendant living here could not be served with process issuing out of the Chancery in Ireland.

But the LORD CHANCELLOR overruled the plaintiff's counsel, and said as to the cases of the Lord Arglasse, the fraudulent contracts were made here in England; and as to the present case there would be no failure of justice, for they might have a subpœna out of this court returnable in the Chancery of Ireland; as in his own experience in cases between master and 'prentice in the city of London, he had known subpœnas to have issued out of this court returnable in the Mayor's court in London for persons that lived out of the jurisdiction;

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[1] 1 Vern. 75.

[2] See Barker *v.* Dormer, 1 Show. 192.

and therefore pronounced the rule for the dismissing the bill: but at the importunity of the plaintiff's counsel gave them a week's time to search for precedents.

The Lord Chancellor and the Judges having been attended with precedents, *Sir John Holt* argued for the plaintiff, as to the preliminary point only (to wit), whether this court had jurisdiction, and might hold plea of the lands in question which lay in Ireland.[1]

The defendant's counsel in a manner waived the preliminary point, and would not enter into the debate whether this court might not decree the trust of lands in Ireland, the trustee living here; but that it was certainly a matter discretionary in the court, whether they would do it or not; and that as this case was circumstanced, they apprehended the court would not interpose.

After long debate, the judges [BEDINGFIELD, C. J., and ATKINS, C. B.] concurring with his Lordship, that the court had a proper jurisdiction in this case, and that the judges in England were proper expositors of the Irish laws, and that by the true construction of this statute the trust was vested in the king, and not the land itself, and the proof being full as to the identity of the person, decreed for the plaintiff, as to one moiety; the trust as to the other moiety being for Sir Morrice Eustace himself, and not for Fitzgerald.[2]

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[1] The arguments of counsel are omitted — ED.

[2] "The Courts of Equity in England are, and always have been, courts of conscience, operating *in personam* and not *in rem;* and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not locally or *ratione domicilii* within their jurisdiction." Per Lord Selborne, in Ewing *v.* Orr Ewing, 9 Ap. Cas. 34, 40. See to the same effect, Archer's Case, 1 Vern. 77 (cited); Arglasse *v.* Muschamp, 1 Vern. 75; Penn *v.* Baltimore, 1 Ves. 443; Cranstown *v.* Johnston, 3 Ves. Jr. 170, 181–182; Jackson *v.* Petrie, 10 Ves. 163, 164; Paget *v.* Ede, 18 Eq. 118; *Re* Longdendale Co., 8 Ch. D. 150; Mercantile Co. *v.* River Plate Trust, '92, 2 Ch. 303; Massie *v.* Watts, 6 Cranch, 148; Cole *v.* Cunningham, 133 U. S. 107, 117–119; Briggs *v.* French, 1 Sumn. 504; Stapler *v.* Hunt, 16 Ala. 799; More *v.* Superior Court, 64 Cal. 345; Le Breton *v.* Superior Court, 66 Cal. 27; Cooley *v.* Scarlett, 38 Ill. 316; Johnson *v.* Gibson, 116 Ill. 294; Baker *v.* Rockabrand, 118 Ill. 365; Cloud *v.* Greasley, 125 Ill. 313; White *v.* White, 7 Gill & J. 208, 211; Brown *v.* Desmond, 100 Mass. 267; Wood *v.* Warren, 2 McCart. 81; Lindley *v.* O'Reilly, 50 N. J. 636, 640; Vreeland *v.* Vreeland (N. J. 1892), 24 Ad. R. 551; (but see Servis *v.* Nelson, 1 McCart. 94;) Hawley *v.* James, 7 Paige, 208; Sutphen *v.* Fowler, 9 Paige, 280; De Klyn *v.* Watkins, 3 Sandf. Ch. 185; Newton *v.* Bronson, 13 N. Y. 587; Blount *v.* Blount, 1 Hawks, 365, 376; Penn *v.* Hayward, 14 Oh. St. 302; Burnley *v.* Stevenson, 24 Oh. St. 474; Vaughn *v.* Barclay, 6 Whart. 392; Episcopal Church *v.* Wiley, 2 Hill, Ch. 446; Farley *v.* Shippen, Wythe (2d ed.), 254; Guerrant *v.* Fowler, 1 Hen. & Munf. 4; Dickenson *v.* Hoomes, 8 Grat. 253. The early case of the Company of Horners, 2 Rolle, R. 471, is *contra.* See also Norris *v.* Chambres, 29 Beav. 246, and *Re* Hawthorne, 23 Ch. D. 743. — ED.

MARK C. FELCH *v.* DAVID HOOPER AND ANOTHER.

In the Supreme Judicial Court, Massachusetts, January 12, October 23, 1875.

[*Reported in* 119 *Massachusetts Reports,* 52.]

Bill in equity, filed December 2, 1873, against David Hooper and Matilda H. Hooper, of Portland, in the State of Maine.

The prayer of the bill was that the defendants be ordered by a decree of the court to execute, acknowledge, and deliver to the plaintiff a deed of conveyance in conformity with the terms of their bond, on payment of the balance of the purchase-money; and for further relief.

On February 17, 1874, the plaintiff filed an amendment to the bill, alleging that the contract by which David Hooper sold the land in question to the plaintiff was entered into and concluded between the latter and an agent of David Hooper in Somerville, and was intended to be carried out in this Commonwealth; that David Hooper was at Somerville in person at the time when the taxes were paid by him and when the offer and tender of the balance of the purchase-money were made to him by the plaintiff; that on the same day David Hooper acknowledged the deed to Matilda H. Hooper, before a justice of the peace in said county of Middlesex, and caused the same to be placed on record while Matilda H. Hooper was at her home in Portland; that since that time the defendants have pretended that David Hooper had actually sold the land to Matilda H. Hooper, but David Hooper has proposed and offered that if the plaintiff would pay a sum much larger than the price stipulated for in the bond, he would procure a conveyance of the land from Matilda H. Hooper to him; that after the execution and delivery and recording of said bond and a payment of a part of the purchase-money as therein provided, and especially after the said tender of the remainder of the purchase-money, which he is and has been ready to pay, the said David Hooper held and the said Matilda H. Hooper now holds the title to said land, and is seised thereof upon a trust for the benefit of the plaintiff; that the defendants have constantly and fraudulently refused to make a conveyance thereof to him, though often requested so to do, unless he would pay a large sum in addition to the price agreed upon; and now, in pursuance of a fraudulent scheme by them conceived to compel the plaintiff to pay an increased price for the land or lose the improvements he had made thereon by consent of David Hooper, before the time when he should have conveyed the same to the plaintiff, and also lose that portion of the purchase-money paid on delivery of the bond, the defendants, though duly notified of this suit, refuse to answer the plaintiff's bill and refuse to submit themselves to the jurisdiction of this court, and remain obstinately without the Commonwealth.

The prayer of the amended bill was that the said land may be decreed to belong beneficially to the plaintiff, and that some proper person may be appointed and authorized to convey to him the legal title thereof, and that the balance of the purchase-money now remaining in his hands, after deducting therefrom the costs of this suit, may be safely deposited or invested under the direction of this court, to be paid over or transferred to the defendants, only upon the execution and delivery by them of a proper deed or deeds to convey or confirm the title of said land to the plaintiff; and for further relief.

The defendants thereupon demurred to the amended bill, assigning as ground of demurrer "that it appears by the plaintiff's own showing that this court has no jurisdiction of the parties defendant in this bill or either of them, and that there has been no legal and sufficient service of the same on said defendants or either of them to authorize this court to take jurisdiction therein."

The case was reserved by Colt, J., for the consideration of the full court, upon the bill as amended and the demurrer.[1]

A. C. Buzzell, for the defendants.

G. W. Park and *G. F. Piper*, for the plaintiff.

COLT, J. The question raised by this demurrer is not whether a contract for the conveyance of land in this Commonwealth can be specifically enforced against a defendant upon whom no service is made within this State, and who is not and never has been a resident. That question was decided in the case of Spurr *v.* Scoville.[2]

The question here is whether under such a contract in writing the plaintiff who has paid or tendered the consideration, and has by the defendant's permission entered upon the land and made improvements thereon, can, under our statutes, upon the allegations of this bill enforce his equitable title to the land in any form.

In Spurr *v.* Scoville it was said that the only effectual decree which could be rendered upon the allegations in that case would require a conveyance of the land in question by the defendant personally; and that courts of equity would not proceed in a cause, where the decree asked for required an absent defendant, not subject to their jurisdiction, to be active in its performance, but could deal only with persons who could be compelled by process to obey their orders. The decision is placed expressly on the ground that the suit was a proceeding *in personam* merely, in which no decree was sought against the property, and no allusion is made to statutory provisions which upon proper allegations might perhaps have afforded relief.

The case at bar differs in this respect, and the plaintiff seeks to enforce an equitable right in the land itself. The bill, as amended, avers that the contract relied on and the payment and other facts alleged were sufficient to charge the land with a trust in the plaintiff's favor, which the defendants refused to perform by refusing to make the required conveyance. And a prayer is added that the land may be decreed to belong beneficially to the plaintiff, and may be conveyed to him by some person duly appointed by the court. To the bill as amended there is a special demurrer on the ground that the court has no jurisdiction of the parties.

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[1] The statement of the case has been much abridged, and the argument for the defendants is omitted. — ED.

[2] 3 Cush. 578.

The doctrine is well established in equity that from the time a valid contract for the sale of land is made, that which ought to have been done is treated, as between the parties, as already done; and the seller and his representatives, and subsequent purchasers from him with notice, will be held to be trustees for the purchaser, for the purpose of affording the latter a remedy against the estate. Atcherley *v.* Vernon;[1] Daniels *v.* Davison;[2] Waddington *v.* Banks;[3] Lewin on Trusts (3d ed.), 174, 175.

Our statutes give this court power to enforce the performance of a contract for the sale of land, made by a deceased person, and to order the executor or administrator to make a conveyance, which it is declared shall have the same force and effect as if made by the person who made the agreement to convey, thus giving effect to the deed of the legal representative although the legal title is in the heirs-at-law, and treating the subject-matter of the contract as personal or real, according to the character which has been given to it by its terms. Gen. Sts. c. 117, §§ 5, 6.

Upon the facts stated in this bill, the land in question is charged with an implied trust in the plaintiff's favor; and the court is not powerless to enforce that trust merely because the parties holding the legal title are beyond its reach. It is said that courts of equity will never allow a trust to fail for want of a trustee. Such a trustee this court is now authorized to appoint, by a statute which provides that when a person, seised of an estate upon a trust, express or implied, is out of the Commonwealth, or not amenable to the process of any court therein having equity powers, this court shall have power to order a conveyance to be made thereof in order to carry into effect the objects of the trust, and may appoint some suitable person in the place of the trustee to convey the same in such manner as it may require. Gen. Sts. c. 100, § 15.

This statute expressly includes implied trusts, and cannot be confined in its application to trusts which are created by deed or will and do not depend upon the proof of facts which may be open to dispute. Walsh *v.* Walsh.[4] Most implied trusts are of the latter description. The statute gives the court power to render an effectual decree, and that is enough to sustain the jurisdiction when the parties or the subject-matter are within its reach. Ward *v.* Arredondo.[5] The decree will be binding on absent parties to the extent of its effect on the land only, even though all parties interested have been notified in accordance with the rules of court. In other States, under similar statutes, similar relief is granted. Matteson *v.* Scofield;[1] Rourke *v.* McLaughlin.[2]

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[1] 10 Mod. 518, 527.

[2] 16 Ves. 249, 255.

[3] 1 Brock. 97.

[4] 116 Mass. 377.

[5] Hopk. Ch. 213.

Upon this demurrer the existence of the trust must be assumed, and the entry must be *Demurrer overruled.*[3]

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[1] 27 Wis. 671.

[2] 38 Cal. 196.

[3] Dew *v.* Clark, 4 Russ. 511 (*semble*, St. 6 Geo. IV. c. 74, § 5), Trustee Act, 1850 c. 60, §§ 9, 10; Lewin (9th ed.) 1153–4; Hart *v.* Sansom, 110 U. S. 151, 155; Montgomery Co. *v.* Street Line, 43 Fed. Rep. 329, Loaiza *v.* Superior Court, 85 Cal. 11; McCann *v.* Randall, 147 Mass. 81, 98–99; Wilson *v.* Martin Wilson Co., 151 Mass. 515, 517, 522; Matteson *v.* Scofield, 27 Wis. 671; Langdell Eq. Pl. (2d ed.) § 63, n. 4 *Accord.* See to the same effect analogous instances of equitable relief, under statutes, where the *res* was within and the defendant without the jurisdiction, Arndt *v.* Griggs, 134 U. S. 316; Quarl *v.* Abbett, 102 Ind. 233.

But if the *res* as well as the trustee is beyond the jurisdiction, in which the *cestui que trust* is so ill-advised as to seek relief, it is obvious that any decree the court may make is *brutum fulmen* Cases cited in preceding paragraph; Watts *v.* Waddle, 6 Pet. 389, 1 McL. 200; Watkins *v.* Holman, 16 Pet. 25; Page *v.* McKee, 3 Bush, 135; White *v.* White, 7 Gill & J. 208; Davis *v.* Headley, 22 N. J. Eq. 115; Lindley *v.* O'Reilly, 50 N. J. 636; Henry *v.* Doctor, 9 Oh. 49.

By statute, in several jurisdictions, the appointment of a new trustee by a court having jurisdiction over the person of the original trustee, vests the title in the new appointee without more. Green *v.* Borland, 4 Met. 330; Parker *v.* Converse, 5 Gray, 336; Hammond *v.* Granger, 128 Mass. 272; Warren *v.* Howard, 99 N. C. 190, 194, McNish *v.* Guerard, 4 Strob. Eq. 66, 79–80. But in the absence of such a statute, the decree of the court cannot of itself divest the old trustee of the title. Hart *v.* Sansom, 110 U. S. 151, 155; McCann *v.* Randall, 147 Mass. 81, 99; Burnley *v.* Stevenson, 24 Oh. St. 474; Davant *v.* Guerard, 1 Speers, 242. The true principle is very clearly stated by Field, J., in McCann *v.* Randall, *supra*: "Independently of statute, a court of equity cannot appoint a person to execute a transfer of the property of another . . . Courts of law can transfer the title to property. In real actions, they declare the title and transfer the possession; in personal actions, by virtue of a levy of execution, they transfer both title and possession; but decrees of courts of equity, except where statutes have made other provisions, operate only *in personam*. 'This power of creating and extinguishing titles the chancellor never had nor claimed to have, except when it was given him by statute. It is true that he frequently directed the sale of property, but it was by his control over the person of the owner that he made the sale effective, *i. e.*, when the sale had been made he compelled the owner to execute a deed pursuant to the sale; and hence, when the owner was out of the jurisdiction, or labored under any incapacity, *e. g.*, of infancy, the chancellor was powerless.' Langdell Eq. Pl. (2d ed.) § 43, note 4; 3 Pom. Eq. Jur. § 1317; Hart *v.* Sansom, 110 U. S. 151." It is for want of this power, independently of statute, that the bill was dismissed in Spurr *v.* Scovill, 3 Cush. 578. It was under the statute passed to supply this want of power that Felch *v.* Hooper, 119 Mass. 52, was decided. This distinction between the statutory and the inherent power of a court of equity is not always borne in mind. See White *v.* White, 7 Gill & J. 208, 211; Druid Co. *v.* Oettinger, 53 Md. 46, 61; Stewart *v.* Firemen's Co., 53 Md. 564; Abell *v.* Brown, 55 Md. 217; Glenn *v.* Williams, 60 Md. 93, 119; Curtis *v.* Smith, 60 Barb. 9. A new trustee appointed by an individual under the forms of the instrument creating the original trust, gets of course no title by such appointment alone. Golder *v.* Bressler, 105 Ill. 419, 432; Nat. Bank *v.* Eldridge, 115 Mass. 424 (compare Loring *v.* Salisbury Mills, 125 Mass. 138); Bumgarner *v.* Cogswell, 49 Mo. 259.

REMOVAL AND APPOINTMENT OF NON-RESIDENT TRUSTEES.

Removal — Permanent removal from the jurisdiction is a ground for the removal of a trustee from his office. O'Reilly *v.* Alderson, 8 Hare, 101 (compare *Re* Mais, 16 Jur.

608); *Re* Renshaw, 4 Ch. 783; *Re* Bighold, 7 Ch. 223; *Re* Pye, 42 L. T. Rep. 247; Ketchum *v.* Mobile Co., 2 Woods, 532; Sloan *v.* Frothingham, 72 Ala. 589; Gale's Pet., R. M. Charlt. 109; Comegys *v.* State, 10 Gill & J. 175, 183 (*semble*); Dorsey *v.* Thompson, 37 Md. 25; Farmers' Co. *v.* Hughes, 11 Hun, 130; Hughes *v.* Chicago Co., 47 N. Y. Sup'r Ct. 531; Maxwell *v.* Finnie, 6 Cold. 434; Woods *v.* Fisher, 3 W. Va. 536. But see, *contra*, Culp's Est., 5 Pa. W. R. 582.

By statute in some jurisdictions, only residents may act as express trustees. Thompson *v.* Edwards, 85 Ind. 414; Rinker *v.* Bissell, 90 Ind. 375; Meikel *v.* Green, 94 Ind. 344.

Removal from the jurisdiction has been thought not to amount to inability or incapacity where there is a power of appointing a new trustee in place of one unable to act or incapable of acting as trustee. Withington *v.* Withington, 16 Sim. 104, *Re* Watts, 9 Hare, 106; *Re* Bignold, 7 Ch. 223 (*semble*). But see, *contra*, Mennard *v.* Welford, 1 Sm. & G. 426; Farmer's Co. *v.* Hughes, 11 Hun, 130; and compare Millard *v.* Eyre, 2 Ves. Jr. 94 (absconding trustee).

APPOINTMENT OF NON-RESIDENT TRUSTEES.

The selection of a non-resident trustee by one having a power of appointment was sustained in the following cases, where all the beneficiaries were also resident abroad: Meinertzhagen *v.* Davis, 1 Coll. 335; *Re* Smith, 20 W. R. 685. And the court itself appointed non-residents as trustees under similar circumstances in *Re* Liddiard, 14 Ch. D. 310; *Re* Hill, W. N. [1874], 228; *Re* Drewe, W. N. [1876], 168; *Re* Cunard, 48 L. J. Ch. 192; *Re* Austen, 38 L. T. Rep. 601; *Re* Freeman, 37 Ch. D. 148; (but see *Re* Guibert, 16 Jur. 852); *Ex parte* Tunno, Bail. Eq. 395. But the court declined to remove resident trustees for the sake of appointing non-residents in their place in *Re* Long, 38 L. J. Ch. 125; *Ex parte* Robert, 2 Strob. Eq. 86. In Pennsylvania the court may appoint non-residents as trustees, but only on condition of their giving bonds. Strobel's Est., 11 Phila. 122. — ED.

SECTION II. (*continued*).

(*b*) Cestui que Trust cannot proceed directly against a Stranger either at Law or in Equity.

ANONYMOUS.

In the Common Pleas, Michaelmas Term, 1499.

[*Reported in Year Book* 15 *Henry VII., folio* 13, *placitum* 1.[1]]

The first case argued by Thomas Frowyk after he was made Chief Justice was this: If the feoffor upon confidence takes animals damage feasant in the land of the feoffees who hold to his use, and by whose sufferance he occupies, may he avow the taking in his own name and in his own right, or not?

All the justices of the bench said he could not avow the taking in his own right,[2] but he might make cognizance in the right of the feoffees, as their servant. For he has no interest in the land, but there is simply a confidence between him and them. The feoffees may punish him at common law for his occupancy, which proves that he had no interest. And if he might take the animals damage feasant and have amends, their owner would be twice punished, for the feoffees may punish him.

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[1] Y. B. 15 H. VII. 2–4 and Y. B. 15 H. VII. 12–23, s. c. — Ed.

[2] Anon., Keilw. 41, pl. 2; 42, pl. 7; 46, pl. 2; Finch, Law (1636), 200 *Accord.* Nor could the *cestui que trust* maintain trespass against a stranger. Anon., Y. B. 15 H. VII. 12–23; Anon., Keilw. 41, pl. 2; 42, pl. 7; 46, pl. 2, s. c.

The right to maintain trespass *quare clausum fregit* seems to have been confined at first to freeholders and termors. The action was denied to a tenant at will by Hankford, J. in Y. B. 11 H. IV. 90–46; but was conceded in Y. B 18 H. VI. 1–1, and in subsequent cases. A tenant at sufferance was excluded from the action in Y. B. 30 H. VI., Fitz Ab. Tresp. 10; Anon., Keilw. 46, pl. 2, 42, pl. 7 (see also Tailor's Case, Clayt. 55, pl. 96), but his right to the action was admitted in Heydon's Case, 13 Rep. 67, 69, and finally it became a rule that any possessor might have trespass for an entry by a wrong-doer. Graham *v.* Peak, 1 East, 244. Accordingly at the present day a *cestui que trust* in possession may doubtless maintain the action against a stranger, as in Cox *v.* Walker, 26 Me. 504; Stearns *v.* Palmer, 10 Met. 32; Seventh Bank *v.* N. Y. Co., 53 N. Y. Sup'r Ct. 412. In Newhall *v.* Wheeler, 7 Mass. 189, a *cestui que trust* in possession was allowed to maintain a writ of entry against one who wrongfully dispossessed him. — Ed.

DOE, ON THE DEMISE OF BRISTOW, *v.* PEGGE.

IN THE KING'S BENCH, EASTER TERM, 1785.

[*Reported in* 1 *Term Reports*, 758 *note* (*a*).]

EJECTMENT was brought for a moiety of the manor of Winkburne, &c., under the will of D. Burnell, as one of his co-heirs. By the testator's marriage settlement in 1748 two terms in trust were created: one for ninety-nine years, to secure an annuity of £200 to his mother; the other for one thousand years, for raising £3,000 for his wife, in case she should have no issue; the money to be raised out of the rents and profits, or by sale or mortgage. The testator died in 1774, having no issue, and devised all his estates to trustees and their heirs, to the use of them and their heirs in trust, after the death of his widow, who was entitled to a life-estate under the marriage settlement, for such person or persons as according to the laws of descent should be his heirs-at-law, and the heirs of their bodies, to take as tenants in common, &c., if more than one. The defendant filed a bill in chancery in 1776 against all persons who were supposed to have any claim as heirs-at-law, and against the trustees, and an issue was directed under which he was found heir-at-law by descent from a daughter of a common ancestor. The lessor of the plaintiff also had filed a bill in 1783, his claim having never been known before; but upon the death of the widow he brought this ejectment, and proved his pedigree from another daughter of the same common ancestor. At the trial the defendant set up these terms; the testator's mother being still living, and her annuity regularly paid by the receiver appointed by the Court of Chancery; the £3,000 having likewise been raised for his widow, and the term assigned in mortgage.

Mr. Justice Heath, who tried the cause at the last assizes at Nottingham, nonsuited the plaintiff, with leave to move to set aside the nonsuit, and enter a verdict for the plaintiff, if the court should be of opinion that he was entitled to recover.

Upon the motion, it was stated that the receiver had been appointed by the Court of Chancery during the life of the widow, and for such premises only as her life-estate did not extend to; and that the lessor of the plaintiff did not desire to disturb the terms, but was ready to partake of the charge.

Wilson, *Dayrell*, and *Brough*, for the plaintiff.

Balguy and *Gally*, contra.[1]

LORD MANSFIELD, C. J. An ejectment is a fictitious remedy to try the title to the possession of lands; it is of infinite consequence that it should be adapted to attain the ends of justice, and not entangled in the nets of form. Great difficulties have arisen as to the legal form of passing land, from the modes of conveyancing in England since the Statute of Uses. Trusts are a mode of conveyance peculiar to this country. In all other countries, the person entitled has the right and possession in himself. But in England estates are vested in trustees, on whose death it becomes difficult to find out their representatives; and the owner cannot get a complete title. If it were necessary to take assignments of satisfied terms, terrible inconveniencies would ensue from the representatives of the trustees not being to be found. Sir E. Northey's clerk was trustee of near half of the great estates in the kingdom; on his death it was not known who was his heir or representative. So that where a trust term is a mere matter of form, and the deeds were muniments of another's estate, it shall not be set up against the real owner. It is therefore settled that a satisfied trust shall be taken to be a trust for the benefit of the heir-at-law. A trust shall never be set up against him for whom the trust was intended. It is a mere form of conveyance. And it is admitted that, where the term is in trust for the benefit of the lessor of the plaintiff, the defendant shall not set it up in ejectment as a bar to his recovery.

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[1] The arguments of counsel are omitted. — ED.

To go a step further: third persons may have titles, and therefore the court say, that where there is a tenant in possession under a lease, which is a bar to the recovery of the lessor, he being to recover by the strength of his own title, yet to prevent this from being turned improperly against the person entitled to the inheritance, whose right is not disputed by the tenant, if the lessor dispute the property only against another, and give notice to the tenant that he does not mean to disturb his tenancy, the court will never suffer the tenant to set up the lease as a bar to the recovery.

There is another distinction to be taken, whether, supposing a title superior to that of the lessor of the plaintiff exists in a third person, who might recover the possession against him, it lies in the mouth of a defendant to say so in answer to an ejectment brought against himself by a party having a better title than his own. I found this point settled before I came into this court, that the court never suffers a mortgagor to set up the title of a third person against his mortgagee. For he made the mortgage, and it does not lie in his mouth to say so, though such third person might have a right to recover possession. Nor shall a tenant who has paid rent, and acted as such, ever set up a superior title of a third person against his lessor, in bar of an ejectment brought by him; for the tenant derives his title from him. Laying down these principles, let us now see the application of them to this case. There are disputes between the plaintiff and the defendant, who are co-heirs; as such, the plaintiff claims half of the property, and wishes to be admitted into possession of the premises with the defendant. He proves his descent. Then what is the defence set up? A trust for a third person, an annuity, is set up. The plaintiff admits the charge, and says that he only claims subject to the incumbrances. The trustees do not assert their title. Then shall others be admitted to set it up? It is clear that the other co-heirs shall not be permitted to dispute the title with him. He and the defendant have an equitable title as tenants in common, and the plaintiff must recover a moiety.

Willes, J., concurred.

Ashhurst, J. In such a case as this a legal bar shall never be set up in ejectment against the justice of the case. The trustees may perform their functions as well, after both the parties are in possession. The old doctrine is relaxed in many instances.

Buller, J. I entirely agree with my Lord. An objection has been taken at the bar, that the plaintiff in ejectment must recover by the strength of his own title: the old cases certainly say so; but for the last forty or fifty years constant exceptions to this rule have been admitted. One case which is received as clear law, and is an exception to it, is that of a tenant who cannot set up the title of the mortgagee against the mortgagor; because he holds under the mortgagor, and has admitted his title.

There was a case before me at Guildhall, and I believe another upon the Oxford circuit, of the same nature, where a lessee for years had got possession of some mortgage deeds, and endeavored to set up that title against the mortgagor; but though this showed that the plaintiff had no right to recover as against the mortgagee, yet I permitted him to do so in that instance; and the decision was acquiesced under.

It is not therefore true that an outstanding unsatisfied term is always an answer to a plaintiff in ejectment. So long ago as the time of Justice Gundry, when an outstanding satisfied term was offered by a defendant in ejectment as a bar to the plaintiff's recovery, that judge refused to admit it, saying, that there was no use in taking an outstanding term, but for the sake of the conveyancers' pockets: since which time it has been the uniform doctrine, that if the plaintiff be entitled to the beneficial interest he shall recover the possession. The next objection is, that this is a reversionary interest; but that is not material; for it has been further ruled of late years that a lessor of a plaintiff may recover in an ejectment a reversionary interest, subject to a lease and right of present possession existing in another.

The annuitant is only entitled to her £200 per annum, and not to the possession itself whilst there is no default; indeed, she does not require it. But the heir-at-law is entitled to the possession subject to that charge. The annuitant, however, is in a different situation from the mortgagee; for the latter is entitled to receive the whole in diminution of the principal and interest.

So that the plaintiff must have a general judgment for that part which is not in the possession of the receiver; and as to that which is, he must enter into a rule not to disturb that possession; submitting to the mortgage and the annuity. *Rule absolute.*[1]

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[1] Lade v. Holford, Bull. N. P. 110 a; Armstrong v. Peirse, 3 Burr. 1901 (*semble*); Doe v. Pott, Doug. 721 (*semble*); Goodright v. Wells, Doug. 777 (*semble*); Goodtitle v. Knott, Cowp. 43, 46 (*semble*) *Accord.*

In Goodtitle *v.* Jones, 7 T. R. 45, it is reported that "Lord Kenyon observed, that on this special verdict the question between the two litigating parties was not open to discussion; for that it was stated in the verdict that an old term, which was created in the last century, had been from time to time assigned, and was noticed as a subsisting term so lately as in the year 1780, in the mortgage by Owen Jones to Derbyshire. That as long as that was in existence, it was an answer to an ejectment brought by any other person. That though under certain circumstances a judge might direct a jury to presume an outstanding satisfied term to have been surrendered by the trustee, yet if no such presumption were made, but it was stated as a fact that the term still continued, such a legal estate in the trustee must prevail in a court of law. That what was said by Lord Mansfield in Lade *v.* Holford, Bull. N. P. 110, 'that he would not suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but direct a jury to presume it surrendered,' must be understood with this restriction, that in either case the jury might presume the term surrendered, but that without such surrender the estate in the trustee must prevail at law, and that to the proposition so qualified he fully assented."

See also, to the same effect, Hodsden *v.* Staples, 2 T. R. 684; Doe *v.* Sybourn, 7 T. R. 2; Barnes *v.* Crow, 4 Bro. C. C. 10, 11, Fenn *v.* Holme, 21 How. 481; Hooper *v.* Scheimer, 23 How. 235, Smith *v.* McCann, 24 How. 398, 403; Sheirburn *v.* De Cordova, 24 How. 423; Lincoln *v.* French, 105 U. S. 614; Langdon *v.* Sherwood, 124 U. S. 74, 85, Bouldin *v.* Phelps, 12 Sawy. 293; Young *v.* Dunn, 10 Fed. R. 717, Sweatt *v.* Burton, 42 Fed. R. 285, Colburn *v.* Broughton, 9 Ala. 351, Williams *v.* Hartshorn, 30 Ala. 211; Arnett *v.* Bailey, 60 Ala. 435, Percifull *v.* Platt, 36 Ark. 456, Vallette *v.* Bennett, 69 Ill. 632, Kirkland *v.* Cox, 94 Ill. 400; People *v.* Force, 100 Ill. 549, Barrett *v.* Hinckley, 124 Ill. 32; Somes *v.* Skinner, 16 Mass. 348, Norton *v.* Leonard, 12 Pick. 152, Chapin *v.* First Society, 8 Gray, 580; Stearns *v.* Palmer, 10 Met. 32, 35, Raymond *v.* Holden, 2 Cush. 264, Davis *v.* Charles River Co., 11 Cush. 506; Chapin *v.* First Society, 8 Gray, 580, First Society *v.* Hazen, 100 Mass. 322, Nugent *v.* Cloon, 117 Mass. 219; Atwood *v.* Frost, 57 Mich. 229, Thompson *v.* Wheatley, 13 Miss. 506; Wolfe *v.* Dowell, 21 Miss. 103; Heard *v.* Baird, 40 Miss. 793, Siemers *v.* Schrader, 88 Mo. 20; Bailey *v.* Winn, 101 Mo. 649; Den *v.* Bordine, Spencer, 394, Brown *v.* Combs, 5 Dutch. 36, 39–41, Wright *v.* Douglass, 3 Barb. 554, Peck *v.* Newton, 46 Barb. 173; Townshend *v.* Frommer, 57 N. Y. Sup'r Ct. 90; Matthews *v.* McPherson, 65 N. C. 189 (but see Grubb *v.* Lookabill, 100 N. C. 267); Pownal *v.* Myers, 16 Vt. 408 (*semble*); Gillett *v.* Treganza, 13 Wis. 472; Eaton *v.* Smith, 19 Wis. 537, Kinney *v.* Dexter, Wis. 1892, 51 N. W. R. 82.

In Pennsylvania, a *cestui que trust* may maintain an action at law. Kennedy *v.* Fury, 1 Dall. 72, Presbyterian Congregation *v.* Johnston, 1 Watts & S. 9, 56, School Directors *v.* Dunkleberger, 6 Barr, 29, Tritt *v.* Crotzer, 13 Pa. 451, 457; Fernstler *v.* Seibert, 114 Pa. 196.

Mr. Lewin, referring to the principal case, says: "The doctrines advanced by Lord Mansfield in the last century were long ago overruled. . . . 'Lord Mansfield,' as Lord Redesdale observed [Shannon *v.* Bradstreet, 1 Sch. & Lef. 66], 'had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts.'" Lewin, Trusts (9th ed.), 762.

Nor can a *cestui que trust* bring an action for damages for an injury to realty held in trust. Davis *v.* Charles River Co., 11 Cush. 506. Compare Hastey *v.* Ingalls, 15 Neb. 123; Fremont Co. *v.* Sebright (Neb., 1892), 51 N. W. R. 833.

In the following cases the plaintiff was allowed to have ejectment although the dry legal title was outstanding. Mowry *v.* Cummings, 34 F. Rep. 713; Doggett *v.* Hart, 5 Fla. 215 (*semble*); Peterson *v.* Orr, 12 Ga. 464; Goodson *v.* Beacham, 24 Ga. 150; McLeod *v.* Bozena, 26 Ga. 177; Dudley *v.* Bradshaw, 29 Ga. 17, 25; Miller *v.* Swift, 39 Ga. 91 (*semble*); Fahn *v.* Bleckley, 55 Ga. 81; Howell *v.* Ellsbury, 79 Ga. 475, 480; Glover *v.* Stamps, 73 Ga. 209; Merrill *v.* Dearing, 47 Minn. 137 (*semble*, statutory); Murray *v.* Blackledge, 71 N. Ca. 492; Johnson *v.* Prairie, 91 N. Ca. 159; Hopkins *v.* Ward, 6 Munf. 38.

A *cestui que trust* of personalty cannot maintain an action against a stranger for

E. W. BAILEY *v.* NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY.

In the Supreme Judicial Court, Massachusetts, November, 1873.

[*Reported in* 114 *Massachusetts Reports*, 177.]

Contract upon a policy of life insurance. Writ dated June 9, 1873. By the terms of the policy, which was dated June 28, 1860, the defendants, in consideration of the premium paid and to be paid annually "by Joseph A. Bailey, Jr.," "being the assured in this policy," "do insure the life of said Joseph A. Bailey, Jr., in the amount of $2500 for the term of his life." "And the said company do hereby promise to, and agree with the said assured, his executors, administrators, and assigns, well and truly to pay the said sum insured to the said assured, his executors, administrators, or assigns, sixty days after due notice and proof of the death of the said assured during the continuance and before the termination of this policy. For the benefit of his widow, if any."

In the Superior Court the case was submitted upon the following agreed statement of facts: —

"The defendants admit all the facts necessary to enable the plaintiff to recover, except her right to maintain this action in her own name, and insist that no action can be brought upon said policy except in the name of the executor or administrator of Joseph A. Bailey, Jr., the insured. This question is submitted to the court, judgment to be entered for the plaintiff in the sum of $2500, with interest

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a tort. Liptrot *v.* Holmes, 1 Ga. 381 (*semble*); Martin *v.* Poague, 4 B. Mon. 524; Daniel *v.* Daniel, 6 B. Mon. 230; Mitchell *v.* Mitchell, 35 Miss. 108 (*semble*); Pollard *v.* Thomas, 61 Miss. 150; Garrett *v.* Carlton, 65 Miss. 188; Myers *v.* Hale, 17 Mo. Ap. 204; (but see *contra*, Chouteau *v.* Boughton, 100 Mo. 406); Merritt *v.* Windley, 3 Dev. 399; Jones *v.* Strong, 6 Ired. 367; Poage *v.* Bell, 8 Leigh, 604. In Pennsylvania an equitable title to personalty is enough to support an action for converting or injuring it. Brewer *v.* Fleming, 51 Pa. 326; Miller *v.* Zufall, 113 Pa. 317.

The trustee is, of course, the proper plaintiff in actions to recover land or damages for a tort relating to land. Wooderman *v.* Baldock, 8 Taunt. 676; Colburn *v.* Broughton, 9 Ala. 351; Rice *v.* Brown, 77 Ill. 549; Hawkins *v.* County Comm., 2 All. 254; Board *v.* East Saginaw, 42 Mich. 257; Lancaster *v.* Conn Co., 92 Mo 460; State *v.* Mayor, 32 N. J. 49; State *v.* Eastern Co., 36 N. J. 181; Walker *v.* Fawcett, 7 Ired. 44; Woodman *v.* Good, 6 Watts & S. 169; Penn. Co. *v.* Duncan, 111 Pa. 352; Linning *v.* Crawford, 2 Bail. 296; Rogers *v.* White, 1 Sneed, 68.

And also in actions for the conversion of or injury to personal property. White *v.* Morris, 11 C. B. 1015; Barker *v.* Furlong, '91, 2 Ch. 172, Baker *v.* Washington, 5 R. & P. 142; Chambers *v.* Mauldin, 4 Ala. 477; Stoker *v.* Yerby, 11 Ala. 322; Parsons *v.* Boyd, 20 Ala. 112; Ryan *v.* Bibb, 46 Ala. 323; McRaeny *v.* Johnson, 2 Fla. 520, Wynn *v.* Lee, 5 Ga. 217, 236; Schley *v.* Lyon, 6 Ga. 530; Meridith *v.* Hickman, 1 A. K. Marsh. 242; Newman *v.* Montgomery, 6 Miss 744; Presley *v.* Rogers, 24 Miss. 520; Presley *v.* Stribling, 24 Miss. 527; Lacey *v.* Giboney, 36 Mo. 320; Pace *v.* Pierce, 49 Mo. 393; Coleson *v.* Blanton, 3 Hayw. 152; Hexter *v.* Schneider, 14 Oreg. 184; Hower *v.* Geesaman, 17 S. & R. 251; Hartness *v.* Warren, 106 N. Ca. 427; Nixon *v.* Rose, 12 Grat. 425. — Ed.

from May 29, A. D. 1873, or for the defendants, as the court shall determine upon the foregoing agreed statement."[1]

Judgment was ordered for the defendants, and the plaintiff appealed to this court.

F. V. Balch, for the plaintiff.

D. Foster, for the defendants.

ENDICOTT, J. We think the question raised in this case has been settled by the recent decisions of this court. In Burroughs *v.* State Assurance Co., 97 Mass. 359, it was held, on a policy payable upon the death of the assured to his executors, administrators, or assigns, for the use of the wife and children of the assured, that an assignee of the same could maintain the action, although in fact it was defended by the guardian of an infant child of the assured, the wife being dead. If the assured had left no wife or child, the assignee, upon recovery, would have received the whole amount to his own use; as the assured left a child, the assignee would hold the amount recovered subject to the equitable rights of the child, which could not be determined in that suit, but might be, if necessary, in a suit brought afterwards by the child against the assignee. In Gould *v.* Emerson, 99 Mass. 154, such a suit was brought by a child against an administrator who had received the amount due upon a similar policy, and judgment was for the plaintiff, on the ground that the same having been properly paid to the administrator, he held it as trustee; that the plaintiff did not claim as creditor, legatee, or distributee, but as *cestui que trust* of money in regard to which the trustee had no duty but immediate payment.

The principle upon which these decisions rest is that in policies of this kind the executor, administrator, or assignee becomes a trustee under an express trust, and the legal title being in him, he can maintain an action in his own name against the company. It therefore necessarily follows that the *cestuis que trust* cannot maintain such action, but must have their rights determined between themselves and the trustee in other forms of proceeding. This brings this class of trusts within the general rules governing all trusts, and renders the practice simple and uniform. To allow *cestuis que trust* to maintain actions in their own names might subject insurers to several suits on the same policy, or call upon them to determine who has the beneficial interest, or force them to resort to a bill of interpleader to ascertain the equitable rights of the parties.

In Campbell *v.* New England Insurance Co., 98 Mass. 381, a suit was brought, as in the case at bar, by a wife who had the entire equitable interest, but the objection that she could not maintain the action was not taken till the case was on trial for the third time. The court held that the defendants, by their previous conduct of the case, had waived the right to avail themselves of this objection, but intimated that if valid, and seasonably taken, it would have rendered the other ground of defence immaterial. See also Exchange Bank *v.* Rice, 107 Mass. 37.

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[1] The statement of facts is slightly abridged. — ED.

We think the objection valid, in this case seasonably taken, and there must be *Judgment for the defendants.*[1]

MORGAN *v.* KANSAS PACIFIC RAILWAY CO.

IN THE UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK, SEPTEMBER 11, 1882.

[*Reported in* 15 *Federal Reporter,* 55.[2]]

BILL in equity by the holder of certain coupons attached to income bonds of the Kansas Pacific Railway Company, for an accounting and a decree of payment. The plaintiff sues "on behalf of himself and all other holders of income bonds who may show themselves entitled to relief, and who shall in due time come in and ask relief by and contribute to the expenses of this suit." Lewis, the trustee of the bonds, was named as defendant to the bill, but was not served with process, and did not appear in the cause. The bill averred a request upon

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[1] San Diego Co. *v.* Cal. Bank, 52 Fed. Rep. 59; Grady *v.* Ibach (Ala. 1891), 10 So. R. 287; Hartford Co. *v.* Miller, 41 Conn. 112; Equitable Society *v.* Smith, 25 Ill Ap. 471, Robbins *v* Cheek, 32 Ind. 328; Brooking *v.* Clark, 2 Litt. 197; Jenkins *v.* Morton, 3 Mon. 28; Lovell *v.* Nelson, 6 J. J. Marsh. 247; Stowe *v.* Phinney, 78 Me 244; Denton *v.* Denton, 17 Md. 403; Unity Assoc. *v.* Dugan, 118 Mass. 219 (*semble*); Flynn *v.* Mass Assoc., 152 Mass. 288, 289; Forrest *v.* O'Donnell, 42 Mich. 556; Crosby *v.* Bowery Bank, 50 N. Y. Sup'r Court, 453; Wynne *v.* Heck, 92 N. Ca. 414; Tuttle *v.* Catlin, 1 D. Chip. 366; Tolam *v.* Lewes, 1 Leigh, 436; Garland *v.* Jacobs, 2 Leigh, 651; Poage *v.* Bell, 8 Leigh, 604 *Accord.*

McComas *v.* Covenant Co., 56 Mo. 573, *contra.* The anomalous doctrine which permits an undisclosed principal to sue on contracts made with the agent is objectionable because the principal is, in truth, a *cestui que trust* and not a party to the contract.

/ The right of the trustee to sue on a contract held in trust is universally acknowledged. Moore *v* Penn, 5 Ala. 135; Winters *v.* Rush, 34 Cal. 136; Keyser *v.* Fendall, 5 Mack. 47; Treat *v.* Stanton, 14 Conn. 445, 454 (*semble*); Robinson *v.* Jing, 22 Fla. 321; Ponder *v.* McGruder, 42 Ga. 242; Weaver *v.* Trustees, 28 Ind. 112; Dix *v* Akers, 30 Ind. 431; Heavenridge *v.* Mondy, 34 Ind. 28; Musselman *v.* Cravens, 47 Ind. 1; Wolcott *v.* Standley, 62 Ind. 198; Holmes *v.* Boyd, 90 Ind. 332; Landwerlen *v.* Wheeler, 106 Ind. 523; Hall *v.* Bryan, 50 Md. 194; Burroghs *v.* State Co., 97 Mass. 359; Gould *v.* Emerson, 99 Mass 154, 157; Rindge *v* N. E Society, 146 Mass. 286; Beardslee *v.* Horton, 3 Mich. 560; Forrest *v.* O'Donnell, 42 Mich. 526; Cremer *v.* Wimmer, 40 Minn. 511; Lundberg *v.* N. W. Co., 42 Minn. 37; Close *v.* Hodges, 44 Minn. 274; Murphew *v.* Sewell, 44 Minn. 530; Anderson *v.* Reardon, 46 Minn. 185; Commissioners *v.* Walker, 7 Miss. 143; Young *v.* Hughes, 20 Miss. 93; Philips *v.* Ward, 51 Mo. 295; Snider *v.* Adams Co. 77 Mo. 523; Beck *v.* Haas, Mo. 1892, 20 S. W. R. 18; Long Dock Co *v.* Bentley, 37 N. J. Eq. 15; Stillwell *v* Hurlburt, 18 N. Y. 374; Considerant *v.* Brisbane, 22 N. Y. 389; Arcade Co. *v.* Wiatt, 1 Oh. C. C. 55; White *v.* Wright, 29 Oh. St. 427; Holladay *v.* Davis, 5 Oreg. 40; Hexter *v.* Schneider, 14 Oreg. 184, Binney *v.* Plumley, 5 Vt. 500.

A trustee is properly sole petitioner for a mandamus. Tyler *v.* Houghton, 25 Cal 26. — ED.

[2] 21 Blatchf. 134 s. c. — ED.

refused, in Tyler, by Tr.

Lewis to bring this suit, but no proof of the averment was offered at the hearing.

G. H. Foster, for plaintiff.

J. F. Dillon and *A. H. Holmes*, for defendants.

BLATCHFORD, Justice. Benjamin W. Lewis is named in the bill as a defendant. Process of subpœna is prayed against him in the bill. The bill avers that "during the several years last past the defendant Benjamin W. Lewis has duly become sole trustee under said income mortgage," and "has been requested to bring an action for the accounting and injunction asked by the plaintiff herein, but he has neglected and failed to bring such action or comply with said request, and he is, therefore, made a defendant in this action." The answer of the Kansas Pacific Railway Company admits that "during several years last past Benjamin W. Lewis has been the sole trustee under said income mortgage, but it has no knowledge or information sufficient to form a belief as to whether or not he has been requested by complainant to bring an action for the accounting and injunction asked by complainant herein." This raises an issue as to the request to Lewis.

Lewis, being the trustee under the mortgage, is the proper party plaintiff in a suit of this character, and some good reason must appear of record why he does not sue as plaintiff; and, in such case, he must be made defendant. The bill recognizes this necessity, and hence makes the averments referred to. The averment as to the request to Lewis is controverted, but it is not proved on the part of the plaintiff. It would be necessary to prove it, even though Lewis were served with process or appeared. It is not alleged in the bill that he is beyond the jurisdiction of the court, nor is that fact proved. The bill, it is true, describes Lewis as "of the city of St. Louis," and as "a citizen of the State of Missouri." But that is not sufficient. And even if it were shown that Lewis was not and could not be found within this district, to be served with process, there is nothing in section 737 of the Revised Statutes which makes it proper for the court to adjudicate the suit without the presence of Lewis, because the issue as to whether Lewis refused to sue, as stated, is one on which Lewis must be heard, and under section 737 he cannot be concluded or prejudiced by a decree rendered in his absence. The statute cannot be construed so as to convert real parties and necessary parties into no parties at all. There is, in this case, no suit to adjudicate unless Lewis be plaintiff, or unless, if he be defendant, he be served or appear. Rule 47 in equity is to the same purport. It makes it discretionary with the court to proceed, as does section 737.

For the foregoing reason, and without deciding expressly or impliedly any other question raised in the case, the only disposition that can now be made of the suit is to dismiss the bill, with costs, but without prejudice to any other suit in any court.[1]

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[1] Berry *v.* Mo. Co., 22 Fed. Rep. 631 (compare Spies *v.* Chicago Co., 24 Blatchf. 280); Duncan *v.* Simmons, 2 St. & P. 356; Western Co. *v.* Nolan, 48 N. Y.

CAREY AND OTHERS *v.* BROWN.

IN THE SUPREME COURT, UNITED STATES, OCTOBER, 1875.

[*Reported in* 92 *United States Reports*, 171.]

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Mr. Conway Robinson for the appellants.

Mr. Thomas J. Durant for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.[1]

The appellants were defendants in the court below. Tucker and Hoskins, the other defendants, declined to appeal.

The case was ably argued here by the counsel upon both sides.

It is insisted that the bill is fatally defective for want of parties. It alleges that the complainant was the owner and holder of the ten promissory notes which lie at the foundation of the case. In his testimony, he says he held the legal title to them, and that they were delivered to him by their respective owners, with power to settle and dispose of them at his discretion, and with no condition imposed but the implied one that he should account for the proceeds to those from whom he received them.

The transfer created a trust. Those who transferred them were the *cestuis que trust*, and Brown was the trustee.

The general rule is, that in suits respecting trust-property, brought either by or against the trustees, the *cestuis que trust* as well as the trustees are necessary parties. Story's Eq. Pl. sect. 207. To this rule there are several exceptions. One of them is, that where the suit is brought by the trustee to recover the trust property or to reduce it to possession, and in no wise affects his relation with his *cestuis que trust*, it is unnecessary to make the latter parties. Horsly *v.* Fawcett, 11 Beav. 569, was a case of this kind. The objection taken here was taken there. The Master of the Rolls said, "If the object of the bill were to recover the fund with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust-moneys, so as to enable the trustee hereafter to distribute them agreeably to the trusts declared. It is, therefore, unnecessary to bring before the court the parties

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513; *Re* Straut, 126 N. Y. 201, 212 (*semble*); Weetjen *v.* Vibbard, 5 Hun, 265 *Accord.*

A fortiori a *cestui que trust* cannot proceed in equity to enforce a legal demand of the trustee against a third person, unless the trustee is either unwilling or unable to proceed himself at law. Rose *v.* Clarke, 1 Y. & C. C. C. 534, 548; *Re* Uruguay, 11 Ch. D. 372; Hall *v.* Thompson (May, 1892), 36 Sol. J. 543; N. Y. Co. *v.* Memphis Co., 107 U. S. 205; Duncan *v.* Simmons, 2 St. & P. 356; Doggett *v.* Hart, 5 Fla. 215; Mason *v.* Mason, 33 Ga. 435; Harlow *v.* Miske, 64 Miss. 25.

[1] A part of the opinion, not relating to the question of parties, is omitted. — ED.

beneficially interested." Such is now the settled rule of equity pleading and practice.[1] *Decree affirmed.*

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[1] The doctrine of the principal case has been repeatedly affirmed. *Bills to recover the trust property from a stranger.* Jones *v.* Goodchild, 3 P. Wms. 33; Franco *v.* Franco, 3 Ves. Jr. 75; May *v.* Selby, 1 Y. & C. C. C. 235; Robinson *v.* Evans, 7 Jur. 735; Bridget *v.* Hams, 1 Coll. 72; Alexander *v.* Cana, 1 De G. & Sm. 415; Horsley *v.* Fawcett, 11 Beav. 565; Peake *v.* Ledger, 4 De G. & Sm. 137; Hughes *v.* Key, 20 Beav. 395; Baynard *v.* Woolley, 20 Beav. 583, 585; Glegg *v.* Rees, 7 Ch. 71; Stace *v.* Gage, 8 Ch. D. 451; Cooper *v.* Vesey, 20 Ch. Div. 611; Bifield *v.* Taylor, Beatty, 91; Hickox *v.* Elliott, 10 Sawy. 415; Stewart *v.* Duffy, 53 Ind. 564, 574; Aben *v.* Brown, 55 Md. 217; Ashton *v.* Atlantic Bank, 3 All. 217; Bromley *v.* Mitchell (Mass., 1892), 30 N. E. R. 83; Cook *v.* Wheeler, Harringt. Ch. 443; Martin *v.* McReynolds, 6 Mich. 70, 73; Triggs *v.* Jones, 46 Minn. 277; Ferguson *v.* Applewhite, 18 Miss. 301; Toronto Co. *v.* Chicago Co., 123 N. Y. 37; *Re* Straut, 126 N. Y. 201; Female Ass'n *v.* Beekman, 21 Barb. 566; Warren *v.* Howard, 99 N. Ca. 190; (but see Blake *v.* Allman, 5 Jones, N. Ca. 407).

Foreclosure bills. Shaw *v.* R. R. Co., 100 U. S. 605; Richter *v.* Jerome, 123 U. S. 233; Hall *v.* Sullivan Co. (U. S. C. Ct.), 21 Law Reporter, 138; Campbell *v.* R. R. Co., 1 Woods, 368; Swift *v.* Stebbins, 4 St. & P. 447; Land Co. *v.* Peck, 112 Ill. 408, 435; Rinker *v.* Bissell, 90 Ind. 375; Shaw *v.* Norfolk Co., 5 Gray, 162; Sill *v.* Ketchum, Harringt. Ch. 423; Adams *v.* Bradley, 12 Mich. 346; Moulton *v.* Haskell (Minn., 1892), 52 N. W. R. 960; Hays *v.* Galion Co., 29 Oh. St. 330; West *v.* Morris, 2 Disney, 415. *Redemption bills.* Mills *v* Jennings, 13 Ch. Div. 611, 6 App. Cas. 698, 710; Boyden *v.* Partridge, 2 Gray, 190. *Bill for specific performance.* Potts *v.* Thames Co., 15 Jur. 1004. *Bill to restrain a tort to realty.* Smith *v.* Portland, 30 Fed. Rep. 734. *Bill to establish title under Burnt Records Act.* Harding *v.* Fuller (Ill., 1892), 30 N. E. R. 1053.

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The opposite rule prevails in a few jurisdictions.

Bills to recover the trust fund. Stone *v.* Hale, 17 Ala. 557; Stillwell *v.* McNeely, 1 Green, Ch. 305. *Foreclosure bills.* Large *v.* Van Doren, 1 McCart. 208; Allen *v.* Roll, 25 N. J. Eq. 163; Jewell *v.* West Orange, 36 N. J. Eq. 403; Tyson *v.* Applegate, 40 N. J. Eq. 305; unless the beneficiaries are too numerous to be conveniently joined as plaintiffs, as in Willink *v.* Morris Co., 3 Green, Ch. 377; Williams *v.* N. J. Co., 25 N. J. Eq. 13. *Bill to enjoin a prejudicial sale.* *Ex parte* Mackay, 8 S. Ca. 48.

It follows from the decision in the principal case that the jurisdiction of the United States courts depends upon the citizenship of the trustee, and not upon that of the *cestui que trust.* Coal Co. *v.* Blatchford, 11 Wall. 172 (*semble*); Knapp *v.* R. R. Co., 20 Wall. 117, 123; New Orleans *v.* Gaines, 138 U. S. 595, 606; but see *contra*, Banigan *v.* Worcester, 30 Fed. Rep. 392.

58 Fed. 53,
96 Fed. 66

In Hall *v.* Harris, 11 Tex. 300, it was held that no objection could be made to the joinder of a *cestui que trust* as plaintiff. But in Cooper *v.* Vesey, 20 Ch. Div. 611, the Court would not permit a *cestui que trust*, who was improperly made a co-plaintiff, to recover his costs from the unsuccessful defendant.

WHEN CESTUI QUE TRUST NEED NOT BE A CO-DEFENDANT.

Whenever the trustee adequately represents the *cestui que trust* the latter need not be made a party defendant to a suit in equity. *Bills to deprive the trustee of the trust-res.* Andrew *v.* Cooper, 45 Ch. D. 444 (disapproving of Clegg *v.* Rowland, 3 Eq. 368); Kerrison *v.* Stewart, 93 U. S. 155; Vetterlein *v.* Barnes, 124 U. S. 169, 45 Fed. Rep. 741; Beals *v.* Illinois Co., 133 U. S. 290; Short *v.* Magruder (U. S. C. Ct., Va., 1885), 20 A. L. Rev. 137; Marriott *v.* Givens, 8 Ala. 694; Hunt *v.* Weiner, 39 Ark. 70; Tucker *v.* Zimmerman, 61 Ga. 599; Johnson *v.* Candage, 31 Me. 28; Stevenson *v.* Austin, 3 Met. 474; Jewett *v.* Tucker, 139 Mass. 566; Winslow *v.* Minn. Co., 4 Minn. 313; Redin *v.* Branhan, 43 Minn. 283; Rogers *v.* Rogers, 3 Paige, 379; Wakeman *v.* Grover, 4 Paige, 23; Van Voorhis *v.* Kelly, 31 Hun, 293; (compare U. S. Co. *v.* Roche, 41 Hun, 549); Campbell *v.* Watson, 8 Oh. 498; Irwin *v.* Keen, 3 Whart. 347; Therasson *v.* Hickok, 37 Vt. 454. But see *contra*, Ebell *v.* Bursinger, 70 Tex. 120; Biron *v.* Scott, 80 Wis. 206. *Bills for specific performance.* Fry, Sp. Perf. (1st ed.), § 99; Van Dover *v.* Robinson,

A. B. WETMORE, AS EXECUTOR, APPELLANT *v.* T. H. PORTER, RESPONDENT.

IN THE COURT OF APPEALS, NEW YORK, MARCH, 1883.

[*Reported in* 92 *New York Reports*, 76.]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 3, 1882, which affirmed a judgment in favor of defendant, entered upon an order sustaining a demurrer to plaintiff's complaint herein.

E. Terry for appellant.

Edward Fitch for respondent.[1]

RUGER, Ch. J. The defendant demurred to the complaint upon the grounds:

1st. That there was a defect in the parties defendant, in that the plaintiff should also have been made a defendant.

The complaint sets forth among other things that one Alpheus Fobes died at New York city about the 1st day of July, 1872, having executed a last will and testament, which was admitted to probate by the surrogate of the county of New York, and letters testamentary were duly issued thereon to Abram B. Wetmore as sole executor, who thereafter took the oath of office and duly qualified; that nine $1,000 railroad bonds were of the assets belonging to said estate and were of the value of $12,000; that by an order of the surrogate made on or about the 26th day of May, 1874, the plaintiff was directed to keep the property of the estate, including said bonds, then remaining in his hands invested, and to continue in the discharge of his trust according to the terms of the will; that said bonds came into the custody of the defendant by an arrangement between the plaintiff and defendant (who then knew that the same were trust funds) whereby they were to be used as collateral security at a bank in New York for the firm notes of Porter & Wetmore. That firm consisted of the plaintiff and defendant, who were engaged in carrying on a general commission business for their joint individual benefit. The complaint further alleges that the bonds did not belong to the plaintiff individually, but were owned by the estate, and that plaintiff had long tried to re-obtain possession of

In action by A, trustee, v. C. individual. & C objects that A. must be joined as co-Df. Held: Not nec.

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16 N. J. Eq. 256. *Redemption bill.* Sweet *v.* Parker, 22 N. J. Eq. 453. But see *contra*, Woodward *v.* Wood, 19 Ala. 213. *Bill for dissolution and winding up of a partnership.* Taylor *v.* Rockafeller, 18 A. L. Reg. N. S. 298 (citizenship of beneficiary, therefore, did not affect jurisdiction of United States Court).

(In a foreclosure bill the trustee, it is thought, does not adequately represent the *cestui que trust.* The latter should have the opportunity of raising the necessary fund to prevent a foreclosure) Goldsmid *v.* Stonehewer, 9 Hare, App. xxxviii.; Francis *v.* Harrison, 43 Ch. D. 183; U. S. Co. *v.* Roche, 116 U. S. 120, 130 (*semble*); Mavrich *v.* Grier, 3 Nev. 52. But see *contra*, New Jersey Co. *v.* Ames, 1 Beasley, 527; Van Vechten *v.* Perry, 2 Johns. Ch. 197. — ED.

[1] The arguments of counsel are omitted, and a portion of the opinion not relating to the question of parties. — ED.

Bl. to produce deeds in possn. of his late wife
n b issued in absence of cestui. F & D,
1 Drewry. 222. Not sure which

them for the purpose of holding them to accomplish the objects of the trust, but that his efforts had been defeated by defendant; that on the 11th day of April, 1881, the bonds were procured to be sold by the defendant, and on the 12th day of April, 1881, and on several occasions previous thereto, the plaintiff demanded the return of the bonds or the payment of the value thereof from the defendant, but that the defendant, admitting that they were in his custody or control, refused to return them or pay their value to the plaintiff. The complaint closed by demanding judgment for the sum of $15,000 with costs.

The General Term, by a memorandum indorsed upon the papers, and which contains the only information we have of the reasons for their decision, seem to have placed it upon the ground that the complaint showed upon its face that there was a defect of parties defendant. In other words, that the plaintiff should have been made a party defendant with Thomas E. Porter in any action to recover the value or possession of the bonds in question. It, therefore, becomes necessary to refer briefly to the additional allegations contained in the complaint.

It substantially alleges, in addition to what has been recited, that the plaintiff, at the request of the defendant, removed the bonds from the Safe Deposit Company, where the securities of the estate were deposited for safe keeping, and also at defendant's request left them at the Shoe and Leather Bank in New York as security for loans made, and to be made of said bank, by the firm of Porter & Wetmore, to carry on the partnership business, and that the bonds were ordered by defendant on or about the 11th day of April, 1881, to be sold by the Shoe and Leather Bank, and the proceeds applied to pay a firm note of the amount of $10,000, then held by the bank. It was also alleged that Porter was then owing the plaintiff a large sum of money in respect of the firm business, and had sufficient money belonging to the firm to more than pay the amount of the note, at the time of the sale of the bonds.

Upon this state of facts the court below has held upon the strength of the maxim "*Ex turpi causa non oritur actio*," that inasmuch as Abram B. Wetmore in his individual capacity was in collusion with the defendant in despoiling this estate, that he could not in his representative capacity reclaim these bonds from one who had wrongfully come into their possession, and restore them to the trust estate. The court further said that "the remedy of the *cestui que trust* is to have another trustee appointed who shall bring the proper action." In this, we think, it proceeded upon a mistaken view of the rights and duties of the parties. The legal title to these bonds, and the right to their custody, was and remains in the trustee, at least until they reach the possession of some person who has paid full value and is ignorant of their trust character. Whoever receives property knowing that it is the subject of a trust, and has been transferred in violation of the duty or power of the trustee, takes it subject to the right, not only of the *cestui que trust*, but also of the trustee, to reclaim possession of the specific property, or to recover damages for its conversion in case it has been converted. (Briggs *v.* Davis, 20 N. Y. 15.)

In the case of the Western R. R. Co. *v.* Nolan (48 N. Y. 517), this court says: "The trustees are the parties in whom the fund is vested, and whose duty it is to maintain and defend it against wrongful attacks or injury tending to impair its safety or amount. The title to the fund being in them, neither the *cestui que trust*, nor the beneficiaries can maintain an action in relation to it as against third parties, except in case the trustees refuse to perform their duty in that respect, and then the trustees should be brought before the court as parties defendant."

It is an alarming proposition to urge against the legal title which a trustee has to trust funds that his recovery of their possession may be defeated by a wrong-doer, upon the allegation that the lawful guardian of the funds colluded with him in obtaining their possession. This action is sought to be maintained by the plaintiff solely in his representative capacity as executor or trustee under the will of Alpheus Fobes.

The twin maxims "*Ex dolo malo non oritur actio*" and "*Ex turpi contractu actio non oritur*" have no application to the cause of action set up in the complaint. It is not founded upon and does not grow out of the illegal or unauthorized dealings between the plaintiff and defendant, but such dealings are invoked by one of the wrong-doers to defeat a party who is asserting a legal right and who in this action appears in a representative character alone. We see no reason why a trustee who has been guilty even of an intentional fault is not entitled to his *locus penitentiæ* and an opportunity to repair the wrong which he may have committed.

The judgment should be reversed and judgment ordered for the plaintiff upon the demurrer, unless the defendant within thirty days pay plaintiff's costs and answers in the action.

All concur. *Judgment accordingly.*[1]

ANONYMOUS.

IN THE COMMON PLEAS, TRINITY TERM, 1387.

[*Reported in Bellewe's Cases*, 11.]

ACCOUNT against R. T., and counted that he himself was receiver of the Archdeacon of Canterbury, for all England, and that he had made the said R. his deputy under him within the county of N., to render an account to him, and that R. had received certain moneys in such a town by the hands, &c., and certain chattels in another town, &c., and counted in certain, and so the defendant was his receiver in several towns. And he counted further how he himself had accounted for the same moneys to the Archdeacon and made him satisfaction.

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[1] Franco *v.* Franco, 3 Ves. Jr. 75; Greenwood *v.* Wakeford, 1 Beav. 576; Price *v.* Blakemore, 6 Beav. 567; Robinson *v.* Evans, 7 Jur. 738; Baynard *v.* Woolley, 20 Beav. 583; Carson *v.* Sloane, L. R. 13 Ir. 139; Lee *v.* Horton, 104 N. Y. 538, 542; Zimmerman, 108 N. Y. 282; McColl *v.* Fraser, 40 Hun, 111 (*semble*); Abbott *v.* Reeves, 49 Pa. 494 *Accord.* — ED. 3 All. 217, 220 ; 156 N.Y. 459. 66. 20 R.I. 660; L.R. 13 Iri. 139

Thirning. He shows the said R. to be his deputy of the moneys of the Archdeacon, and so not the receiver of the plaintiff, but of the Archdeacon; judgment if action lies.

BELKNAP, C. J. He has counted that he made satisfaction to the Archdeacon, and that R. was his deputy to render account to him and so his receiver, as a sheriff is accountable to the king and a deputy to him, wherefore answer.

THE QUEEN *v.* PAINTER.

IN THE EXCHEQUER, 1590.

(*Reported in* 4 *Leonard*, 32, *placitum* 89.)

SIR WILLIAM PELHAM was Surveyor of the Ordnance, and delivered the money of the king to Painter, Clerk of the Ordnance. It was holden in this case, that for the said money the Queen might have accompt against Painter, although he wanted a privity, which cannot be so in case of a common person; for if any receiver make one his deputy, I shall not have an accompt against him.[1] Popham, Attorney General, If one of the Exchequer lend unto another £500, of the Queen's money, and takes a bond for it in his own name, yet the Queen shall have an accompt against the borrower.

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[1] Stephens *v.* Badcock, 3 B. & Ad. 354; Robbins *v.* Fennell, 11 Q. B. 248; New Zealand Co. *v.* Watson, 7 Q. B. Div. 374; Kaltonbach *v.* Lewis, 10 App. Cas. 617; Colori *v.* Holbrook, 2 N. Y. 126; Naser *v.* First Bk., 116 N. Y. 492 (*semble*); Hoover *v.* Wise, 99 U. S. 308 (*semble* explaining Wilson *v.* Smith, 3 How. 770) *Accord.* But in many cases in this country a depositor has been allowed to maintain a count for money had and received against a sub-agent bank for the amount collected. In most of them, however, the question of privity was either ignored, or thought to be irrelevant. First Bank *v.* Reno Bank, 3 Fed. Rep. 257; Metropol. Bank *v.* First Bank, 19 Fed. Rep. 301; Peck *v.* First Bk., 43 F. R. 357; Cerral Co. *v.* First Bank, 73 Ga. 383; Freeman *v.* Exchange Bank, 87 Ga. 45; First Bank *v.* First Bank, 76 Ind. 561; Manufacturers' Bk. *v.* Continental Bk., 148 Mass. 553; Producers' Bk. *v.* Rickets, 1 W. N. (Pa.) 48; Blaine *v.* Bourne, 11 R. I. 119; Sherman Bank *v.* Weise, 67 Tex. 331; see also Jackson *v.* Partee, 9 Heisk. 296. — ED.

SECTION II. *(continued)*.

(c) A CESTUI QUE TRUST OF AN OBLIGATION CANNOT DISCHARGE THE OBLIGOR.

PARKER *v.* TENANT.

In the Queen's Bench, Michaelmas Term, 1561.

[*Reported in Jenkins, Century Cases*, 221, *placitum* 75.]

A. MAKES an obligation to B. for the use of C. A. seals; A., B., and C. being at the time of sealing it at one place; A. puts the obligation into the hands of C. and says: This will serve. This is a good delivery; and tho' C. afterwards marries A. yet the obligation remains, and is neither extinguished nor suspended.

Adjudged and affirmed in Error.[1]

ANONYMOUS.

In the Common Bench, 1562.

[*Reported in Dalison*, 38, *placitum* 6.]

IN debt upon an obligation Carns, for the defendant, said that whereas he was indebted to one A., brother of the plaintiff, in the sum demanded, A. appointed the plaintiff to be his factor, and to receive an obligation to his use, and the defendant sealed this obligation to the plaintiff to the said use, after which A. released the defendant all actions, suits, and demands. It was held by all the judges that this was no plea, for the obligation was made to the plaintiff, and A. had nothing to do with the action, so that it is no more than the release of a stranger;[2] and if the plaintiff himself had made the release, this would have been a bar.[3] The use here did not appear in the obligation. T. 36 H. VIII. Broke, Obligation, 72 &c., Mes. notes, 284.

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[1] Cotton *v.* Cotton, 2 Vern. 290 *Accord.* — ED.

[2] Offly *v.* Warde, 1 Lev. 235; Scholey *v.* Mearns, 7 East, 147; Stevenson *v.* Rogers, 2 Hill, S. Ca. 291; Tuttle *v.* Catlin, 1 D. Chip. 366 *Accord.* But a release by the *cestui que trust* having the entire beneficial interest would be effectual in equity. Pratt *v.* Dow, 56 Me. 81; McBride *v.* Wright, 46 Mich. 265; Galt *v.* Smith, 145 Pa. 167; Stevenson *v.* Rogers, 2 Hill, S. Ca. 291 (*semble*); Smith *v.* Brown, 5 Rich. Eq. 291. — ED.

[3] Groos *v.* Depeham, 1 Cal. Ch. XLVIII.; Anon. 7 T. R. 666, (*cited*). Equity will set aside a wrongful release if the obligor acted in bad faith. Land Co. *v.* Peck, 112 Ill. 408, Monmouth Co. *v.* Hutchinson, 21 N. J. Eq. 107; Wilson *v.* Stilwell, 14 Oh. St. 464. In some jurisdictions, indeed, the common-law courts have treated such a release as a nullity. Roden *v.* Murphy, 10 Ala. 804; O'Reilly *v.* Miller, 52 Mo. 210; McClaughry *v.* McClaughry, 121 Pa. 477. — ED.

GIBSON *v.* WINTER AND ANOTHER.

IN THE KING'S BENCH, MAY 1, 1833.

[*Reported in* 2 *Law Journal, New Series, King's Bench,* 130.]

DENMAN, C. J.[1] — This was an action on a policy of insurance under seal, in which policy the plaintiff was described to be interested in the subject matter, or duly authorized as owner or agent, or otherwise, and it contained a covenant of the defendants with him, which amounted to an insurance on goods, the property of Le Quesne, of Jersey, who employed the plaintiff and his partner Poingdestre, insurance brokers and commercial agents, in London, to effect this policy. A loss accrued, and in July, 1829, a partial adjustment of the loss to the amount of £3,000 took place between the plaintiff and defendants. The defendants gave credit to the plaintiff for £1,524 9*s.*, due from the plaintiff to them for premiums of insurance on ships, and property of other persons as part payment of this sum, and paid the balance of £1,475 11*s.* to the plaintiff. In September the plaintiff became a bankrupt, not having paid to Le Quesne the amount received by him and allowed in account, and this action was brought by Le Quesne in the name of the plaintiff to recover from the defendants the sum of £1,524 9*s.*, on the ground that the plaintiff was authorized to account for the loss in money only, and that a payment in any other way was not binding upon his principal. There were several pleas, and amongst the rest, a plea of payment, upon which the question arose. At the trial, before Lord Tenterden, at the Sittings after Trinity term, the defendants had a verdict on the ground that Le Quesne had acquiesced in, and adopted the mode of payment pursued by the plaintiff, and was bound by it. If it had depended on the propriety of the verdict, we should have thought it right to submit the case to the consideration of another jury, for we are by no means satisfied that the evidence proved acquiescence and adoption by Le Quesne, as he was never correctly informed of the real state of the facts. It was insisted by the counsel for the defendants, that the evidence proved a general agency in Poingdestre and Gibson, and, therefore, their acts bound Le Quesne; but we are of opinion the verdict cannot be supported on that ground, as their general agency was not proved, and, indeed, was negatived upon the trial. The last objection is, that as the covenant was with Gibson, and he alone could sue upon it, payment to him in any mode by which he was bound, would be a good payment against Le Quesne, and as the settlement with the plaintiff bound him, it equally bound Le Quesne suing in his name; and, upon full consideration, we are of opinion that this objection is valid. The plaintiff, though he sues as trustee of another, must, in a court of law, be treated in all respects as the party upon the re-

hue is pd v. action being in P's name.

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[1] Only the opinion of the court is here given. — ED.

cord. If there is a defence against him, there is a defence against the *cestui que trust* who uses his name, and the plaintiff cannot be permitted to say, for the benefit of another, that his own act is not binding. The following are the authorities which appear to us fully to warrant that proposition. In Bauerman *v.* Radenius,[1] in which the question was, whether an admission by the plaintiff, who was clearly a trustee for another, should be received in evidence. Lord Kenyon says, "If the question which has been made in this case had arisen before Sir Matthew Hale, or Lords Holt or Hardwicke, I believe it never would have occurred to them, sitting in a court of law, that they could have gone out of the record, and considered third persons as parties in the cause. Here it has been contended, that Bauerman & Co. are to be laid out of the case entirely, and we are desired to substitute Van Dyck & Co. as plaintiffs in their room; but if they may be taken to be off the record, then they may be witnesses, and yet it is not pretended, that they could have been examined: the argument, therefore, that asserts that they may be taken from off the record, not holding good to all purposes, fails entirely. I cannot conceive, on what ground it can be said, that Bauerman & Co. may be considered not as parties in the cause, for the purpose of rejecting their admissions, and yet, as the parties in the cause, for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule, that the admission made by a plaintiff upon the record is admissible evidence."[2] So, a release by the plaintiff, upon the record, suing for the benefit of another, was decided, in a case before Lord Mansfield, to be a good answer at law, cited in Bauerman *v.* Radenius; and Lawrence, J. expresses the same opinion in the case last mentioned. The courts of law have been in the habit of exercising an equitable jurisdiction upon motion, and setting such releases aside, or preventing the defendant from pleading them, as in Legh *v.* Legh,[3] Payne *v.* Rogers,[4] Jones *v.* Herbert,[5] and by Abbott, C. J., in Skaife and another *v.* Jackson,[6] and many other cases,[7] which practice shows very clearly the opinion of the Court, that but for their equitable interference, the real plaintiff could not be heard. Again, in Alner *v.* George,[1] where trustees for the benefit of creditors sued in the name of the insolvent, Lord Ellenborough held, that a receipt in full, for the amount by the plaintiffs, was an answer to the action; and his Lordship said, "If a motion had been made in term time, to prevent the defendant from availing himself of this defence, perhaps we might have interfered. Sitting here, I can only look to the strict legal rights of the parties upon the record; and there can be no doubt, that a receipt in full, where the person who gave it was under no misapprehension, and can complain of no fraud or imposition, is binding upon him. The plaintiff might have released his action, and it is impossible to admit evidence of his attempting to defraud others." In Jones *v.* Yates,[2] Lord Tenterden, C. J., said, "We are not aware of any instance, in which a person has been allowed, as plaintiff, in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person; for a party seeking to do that, has the benefit of his own fraud;" and therefore, it was held, where one of two partners disposed of some of their effects in trade, in fraud of the other, both could not sue, in a court of law, to recover for them in an action of trover. Upon principle, and on these authorities, we are of opinion, if there be a good defence against the plaintiff, there is a good defence against Le Quesne suing in his name. The only remaining question is, whether there is a good defence against the plaintiff. Now, if the plaintiff was suing, himself, it is clear the plea of payment would have been proved, for credit given to the plaintiff, for the amount of premiums, was equivalent to payment by the defendants to the plaintiff of that amount. We therefore think, the defendants were no longer liable; but as this point, upon which we decide the case, was intended to be reserved by Lord Tenterden, in which case a nonsuit would have been entered, we think, a similar rule should be now pronounced.

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[1] 7 Term Rep. 663.

[2] Craib *v.* D'Aeth, 7 T. R. 670 n. (*a*); Knorr *v.* Raymond, 73 Ga. 749; Tenney *v.* Evans, 14 N. H. 343 *Accord.* But in Owings *v.* Low, 5 Gill & J. 134, 135, an obligor was not allowed to use an admission of an assignor made to defraud the assignee. See, also, Bragg *v.* Geddes, 93 Ill. 39, 58.

The admission of a *cestui que trust* is competent in a proceeding to which the trustee is alone a party. Hanson *v.* Parker, 1 Wils 257; King *v.* Hardwick, 11 East, 578, 584; Bell *v.* Ansley, 16 East, 141, 143; Smith *v.* Lyon, 3 Camp. 465; Welstead *v.* Levy, 1 M. & Rob. 138; Doe *v.* Wainwright, 3 Nev. & P. 598; May *v.* Taylor, 6 M. & G. 261. But see Pope *v.* Devereux, 5 Gray, 409, 413. — ED.

[3] 1 Bos. & Pul. 447.

[4] Dougl. 391.

[5] 7 Taunt. 421.

[6] 3 B. & C. 421; s. c. 3 Law Journ. K. B. 43.

[7] Hickey *v.* Burt, 7 Taunt. 48; Mountstephen *v.* Brooke, 1 Chitty, 390; Innell *v.* Newman, 4 B. & Al. 419; Manning *v.* Cox, 7 Moore, 617; Barker *v.* Richardson, 1 Y. & J. 362; Green *v.* Williams, Manning, N. P. Index (2 ed.) 127; De Pothonier *v.* Mattos,

Rule absolute for entering a nonsuit.[3]

E. B. & E. 461; Mandeville *v.* Welch, 1 Wheat. 230, 5 Wheat. 277; Brown *v.* Hartford Co., Brunner, 663; Roden *v.* Murphy, 10 Ala. 804; Woolfe *v.* Bate, 9 B. Mon. 208; Hart *v.* Western Co., 13 Met. 99; Greene *v.* Beatty, Coxe, 142; Timan *v.* Leland, 6 Hill, 237; McCullum *v.* Cox, 1 Dall. 139. — Ed.

[1] 1 Campb. 392.

[2] 9 B. & C. 532; s. c. 7 Law Journ. K. B. 217.

[3] In Mayer *v.* Mordecai, 1 S. C. n. s. 383, and Creighton *v.* Pringle, 3 S. C. n. s. 78, a payment to the trustee of a bond in confederate money was held to discharge the obligor, although the trustee was guilty of a breach of trust in accepting the payment.

Application of Purchase Money. — The payment of the purchase money to a trustee authorized to sell, has always been treated as a valid discharge of the purchaser at law. But there were formerly many instances where the purchaser, who had paid the trustee, continued liable in equity if the money paid was not duly applied for the benefit of the *cestui que trust.* This highly artificial doctrine would seem to be indefensible on any principle. Its inconvenience as a working rule became so intolerable that the whole doctrine has been swept away by statute in England, New York and other jurisdictions. In some of our states the doctrine never obtained a foothold in the equity courts. The old learning on this point may be found in Lewin, Trusts (9th ed) 502 *et seq*; 2 Perry, Trusts (4th ed.) § 790 *et seq.*

SET-OFF. — In an action brought by the plaintiff as trustee, the defendant may, at common law, plead a set-off of a debt due to him from the plaintiff as an individual. Forster *v.* Wilson, 12 M. & W. 191, 203 per Parke, B. But equity will enjoin the defendant from relying on such a plea if the plaintiff's claim was known at the time of its creation to be a trust claim. Pannell *v.* Hurley, 2 Coll 241; Bodenham *v.* Hoskins, 2 D. M. & G. 903; Merser *v.* Graves, L. R. 7 Q. B. 499, 504; Nat. Bank *v.* Ins. Co., 104 U. S. 54; Hooper *v.* Armstrong, 69 Ala. 343; Hobbs *v.* Duff, 23 Cal. 596; Flournoy *v.* Jeffersonville, 17 Ind. 169; Bundy *v.* Monticello, 84 Ind. 119; Davis *v.* Commissioner, Morris, Iowa, 161; Carlisle *v.* Long, 1 A. K. Marsh. 486; Wolfe *v.* Bate, 9 B. Mon. 208, 211; Bourne *v.* Wooldridge, 10 B. Mon. 492; Page *v.* Stevens, 23 Mich. 357, Lee *v.* Newell, 107 Pa. 283. See Falkland *v.* St. Nicholas Bank, 84 N. Y. 150. The set-off will be allowed, if the trust relation was unknown to the defendant. School District *v.* First Bank, 102 Mass. 174.

The defendant in an action by the trustee cannot at law plead by way of set-off a debt due to him from the *cestui que trust.* Lane *v.* Chandler, 7 East, 153 (cited); Tucker *v.* Tucker, 4 B. & Ad. 745, 751, 752 (*semble*); Isberg *v.* Bowden, 8 Ex. 852 (overruling Bottomley *v.* Brooke and Rudge *v.* Birch, cited in 1 T. R. 621, 622); Westoby *v.* Day, 2 E. & B. 605, 624; Watkins *v.* Clark, 12 C. B. N. S. 277; Porter *v.* Morris, 2 Harring. 509; Wheeler *v.* Raymond, 5 Cow 231 (but see S. C. 9 Cow. 295, and Caines *v.* Brisban, 13 Johns. 9); President *v* Ogle, Wright (Ohio), 281; Adams *v.* Bliss, 16 Vt. 39. But in most jurisdictions such set-off is allowed in equity, and also as an equitable bar in a common-law action. Cavendish *v.* Geaves, 24 Beav. 163; Agra Bank *v.* Leighton, L. R. 2 Ex. 56; Thornton *v.* Maynard, L. R. 10 C. P. 695; (but see Middleton *v.* Pollock, 20 Eq. 29, and Walker *v.* Brooks, 125 Mass. 241;) McDonald *v.* Bode, 20 Sol. J. 241; (approved in Nayler *v.* Ferrer, 26 W. R. 809, 810;) Corser *v.* Craig, 1 Wash. C. C. 424; Campbell *v.* Hamilton, 4 Wash. C. C. 92, 94; Winchester *v* Hackley, 2 Cranch, 342; Forkner *v.* Dinwiddie, 3 Ind. 34; Henry *v.* Scott, 3 Ind. 412; Jones *v.* Hawkins, 17 Ind. 550; Waddle *v.* Harbeck, 33 Ind. 231; Swindell *v.* Richey, 41 Ind. 281; Heavenridge *v.* Mondy, 49 Ind. 434; Wulschner *v.* Wells, 87 Ind. 71; (but see Stevens *v.* Songen, 14 Ind. 342;) Ward *v.* Martin, 3 Mon. 18; Sheldon *v.* Kendall, 7 Cush. 217; Chandler *v.* Drew, 6 N. H. 469; Felsenthal *v.* Hawks (Minn. 1892), 52 N. W. R. 528; Driggs *v.* Rockwell, 11 Wend. 504; Wolf *v.* Beales, 6 S. & R. 242; Graphic Co. *v.* Marcy, 12 Phila. 218; (but see, *contra*, First Bank *v.* Mason, 95 Pa. 113; Citizens' Bank *v.* Alexander, 120 Pa. 113).

The defendant is not entitled at law to set off a debt due from the plaintiff to a third person as trustee for the defendant. Wake *v.* Tinkler, 16 East, 36; Reeves *v.* Hatkinson, 2 Penningt. 751. But such set-off is allowed in equity, if equity has jurisdiction on other grounds, Clark *v.* Cort, Cr. & Ph. 154; and is now allowed as an equitable plea. Cochrane *v.* Green, 9 C. B. N. S. 448; Elkin *v.* Baker, 11 C. B. N. S. 526; *Ex parte* Morier, 12 Ch. D. 491; (but see Middleton *v.* Pollock, 20 Eq. 29;) Hoffman *v.* Zollinger, 39 Ind. 461; Commw. *v.* Phœnix Bank, 11 Met. 129, 136; Ashby *v.* Carr, 40 Miss. 64; Hunt *v.* Shackleford, 55 Miss. 94; Pollard *v.* Thomas, 61 Miss. 150; Wright *v.* Cobleigh, 23 N. H. 32; Tuttle *v.* Bebee, 8 Johns. 152; Compty *v.* Alken, 2 Bay, 481.

A defendant would be entitled at law to set off the plaintiff's debt to him as trustee. Forster *v.* Wilson, 12 M. & W. 191, 203. But the rule is otherwise in bankruptcy. Fair *v.* M'Iver, 16 East, 130; Wilson *v.* Forster, 12 M. & W. 191; *Re* Lane, 305; and presumably in most jurisdictions the application of equitable principles would defeat the legal set-off to-day. — ED.

SECTION II. (*continued*).

(*d*) WHEN CESTUI QUE TRUST'S INTEREST IN THE TRUST-RES IS FORFEITED BY THE TRUSTEE'S LACHES.

WYCH *v.* EAST INDIA COMPANY.

IN CHANCERY, BEFORE LORD TALBOT, TRINITY TERM, 1734.

[*Reported in* 3 *Peere Williams*, 309.]

THE East India Company were bound by contract to make an allowance of two rupees per cent. to the plaintiff's intestate, for which the plaintiff, the administrator *de bonis non* of his father, brought a bill. The intestate, with whom the company made the contract, was then beyond sea, and there died, leaving an infant son of tender years. Upon the death of the intestate, administration was granted to A. until the said son should come to twenty-one, *ad usum et commodum* of the infant, who at that time was about ——— years of age. The administrator in trust for the infant never commenced any suit on this contract; but the son within six years after his attaining twenty-one, brought this bill against the company, who pleaded the statute of limitations, viz. that the cause of action did accrue above six years before the suit commenced,

Whereupon it was argued, that as the time did not run against the father, with whom the contract was made, because he was beyond sea, and died there; so after the death of the father the son was an infant, and ought not to be barred or prejudiced by the neglect or default of his trustee, the administrator during his minority.

LORD CHANCELLOR. The administrator during the infancy of the plaintiff had a right to sue; and though the *cestui que trust* was an infant, yet he must be bound by the trustee's not suing in time; for I cannot take away the benefit of the statute of limitations from the company, who are in no default, and are entitled to take advantage thereof as well as private persons; since their witnesses may die, or their vouchers be lost. And as to the trust, that is only between the administrator and the infant, and does not affect the company. So where there is an executor in trust for another, and the executor neglects to bring his action within the time prescribed by the statute, the *cestui que trust*, or residuary legatee, will be barred; therefore allow the plea.[1]

for the infant failing to bring action within
the fund, the infant maybe barred by the S. of L.; from time when
he is 21.

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[1] If the Statute of Limitations has run against a trustee, upon any claim, real or personal, legal or equitable, the *cestui que trust*, whether *sui juris* or not, is also barred. Anon., 2 And. 143; Lewellin *v.* Mackworth, 3 Eq. Ca. Ab. 579, Barn. 445, s. c.; Smilt *v.* Acton, 26 Beav. 210, 213 (*semble*); Spickernell *v.* Hotham, Kay, 669, 675; Stone *v.* Stone, 5 Ch. 74; Bolling *v.* Hobday, 31 W. R. 9; Hovenden *v.* Annesley, 2 Sch. & Lef. 629; Pentland *v.* Stokes, 2 Ba. & Be. 68, 74, 75; Meeke *v.* Olpherts, 100 U. S. 564; Trimble *v.* Woodhead, 102 U. S. 647; Hayes *v.* McIntire, 45 Fed. Rep. 529; Colburn *v.* Brough-

LLOYD'S BANKING COMPANY *v.* JONES.

IN THE CHANCERY DIVISION, MARCH 2, 3, 1885.

[*Reported in* 29 *Chancery Division*, 221.]

ON the 17th of November, 1875, Thomas Adams, being then entitled to some leasehold houses in Birmingham, deposited the leases and other title deeds with Lloyd's Banking Company, together with a memorandum signed by him, which stated that the deeds were deposited with the bank, and were to be retained by them, by way of a continuing security to them for any overdraft of his wife's current account. And Adams thereby undertook at his own expense, when required by the bank, to execute to them, or as they should direct, a mortgage of all his estate and interest in the premises comprised in the deeds, which mortgage should contain a power of sale and all usual clauses. On the 10th of November, 1876, Adams died. By his will, dated the 15th of September, 1876, he gave all his estate and effects whatsoever to his wife absolutely, and appointed her executrix. At the time of his death the deeds thus deposited remained with the bank, and after his death Mrs. Adams continued to receive credit from the bank on the security of the deposit. On the 29th of May, 1877, she married Henry Chance. On the 25th of May, 1877, in contemplation of the marriage, Mrs. Adams, with the assent of Chance, assigned the

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ton, 9 Ala. 351, 363; Nimmo *v.* Stewart, 21 Ala. 682; Bryan *v.* Weems, 29 Ala. 428; Fleming *v.* Gilmer, 35 Ala. 62 (*semble*); Molton *v.* Henderson, 62 Ala. 426; Smith *v.* Gillam, 80 Ala. 296; Chase *v.* Cartwright, 53 Ark. 358; Marsh *v.* Dooley, 52 Cal. 232; Wilmerding *v.* Russ, 33 Conn. 67; Worthy *v.* Johnson, 10 Ga. 358; Mason *v.* Mason, 33 Ga. 435; Wingfield *v.* Virgin, 51 Ga. 139; Knorr *v.* Raymond, 73 Ga. 749; Crawley *v.* Richardson, 78 Ga. 213; Salter *v.* Salter, 80 Ga. 178; Lane *v.* Nickerson, 99 Ill. 284; Diffenderfer *v.* Scott, (Ind. 1892), 32 N. E. R. 87; Thomas *v.* White, 3 Litt. 177, 182; Couch *v.* Couch, 9 B. Mon. 160; Darnall *v.* Adams, 13 B. Mon. 273; Edwards *v.* Woolfolk, 17 B. Mon. 381; Coleman *v.* Walker, 3 Met. (Ky.) 65; Barclay *v.* Goodloe, 83 Ky. 493; Smith *v.* Smith, (Ky. 1892), 19 S. W. R. 595; Crook *v.* Glenn, 30 Md. 55; Weaver *v.* Leiman, 52 Md. 708; Bennett *v.* Williamson, 8 Ired. 121; Welborn *v.* Finley, 7 Jones (N. Ca.), 228; Blake *v.* Allman, 5 Jones, Eq. 407; Herndon *v.* Pratt, 6 Jones, Eq 327; Clayton *v.* Cayle, 97 N. Ca. 300; King *v.* Rhew, 108 N. Ca. 696; Smilie *v.* Biffle, 2 Barr, 52; Moore *v.* Barry, 1 Bail. 504; Pledger *v.* Easterling, 4 Rich. 101; Long *v.* Cason, 4 Rich. Eq. 60, 64 (*semble*); Tutt *v.* R. R. Co., 28 S. Ca. 388; Williams *v.* Otey, 8 Humph. 563; Wooldridge *v.* Planters' Bank, 1 Sneed, 297; Goss *v.* Singleton, 2 Head, 67; Watkins *v.* Specht, 7 Coldw. 585; Woodward *v.* Boro, 16 Lea, 678; Collins *v.* McCarty, 68 Tex. 150; Sheppard *v.* Turpin, 3 Grat. 373.

But see, *contra*, Allen *v.* Sayer, 2 Vern. 368; Lechmere *v.* Carlisle, 3 P. Wms. 215; Bacon *v.* Gray, 23 Miss. 140.

On the other hand, if the trustee is an infant, the Statute of Limitations will not run against the *cestui que trust* even though the latter be *sui juris*. Clayton *v* Rose, 87 N. Ca. 106; Waring *v.* Cheraw, 16 S Ca. 416. See also Grimsby *v.* Hudnell, 76 Ga. 378. So, if a devisee in trust disclaims, so that under a statute the title vests in the Supreme Court, the Statute of Limitations will not begin to run until a new trustee is appointed. Dunning *v.* Ocean Bank, 6 Lans. 296. — ED.

asgnd e prop setld by e dds + X + held a lien [illegible] in by A, [illegible]
bnk knew mtg & this asgmt. Dds remnd w bnk a secty f overdraft. B's acct. Ltr a
new memdum w nd stng tt dds ben hld + secr [illegible] overdft. Aft tt X lrnd tt deed
wr a held, bnk odmnd then. Hld; Bnk prevld tho not [illegible] mtge.

leasehold property comprised in the deposited deeds to John Jones, in trust for herself until the intended marriage, and, after the solemnization thereof, upon trust to permit her to use and occupy the premises, or otherwise enjoy the rents thereof for her separate use, until the sale thereof as thereinafter provided, and upon trust that the trustee should, at the sole request in writing of Mrs. Adams, notwithstanding coverture, during her life, and after her death at the discretion of the trustee, sell the leasehold premises, and should stand possessed of the residue of the proceeds of sale (after payment of costs and expenses), and also of the rents and profits of the premises, in case Mrs. Adams should not continue to occupy the same, in trust during her life to pay the same to her for her separate use. And it was further declared that, in the event of the death of Mrs. Adams before the premises should be sold, the trustee should stand possessed of the same and the rents thereof, in trust for T. J. Adams (the son of Mrs. Adams by her late husband) absolutely. No inquiry was made by the trustee about the title deeds of the property, and no notice of the settlement was given to the bank. On the 6th of June, 1877, Mrs. Chance went with her husband to the bank, and informed the manager of her marriage (this being the first notice the bank had of the marriage), and, at the request of her and her husband, a balance of £133 16*s.* 5*d.*, which then stood to the credit of her current account, was transferred by the bank to the credit of a new account opened in the name of Henry Chance. No notice of the settlement was given to the bank, but the deeds were allowed to remain with them as a security for any overdraft of Chance's account. In November, 1877, the bank wrote to Chance, whose account was then overdrawn, requesting him to let them have a copy of the will of Mrs. Chance's former husband, that they might consider what was necessary to be done under the altered circumstances. The probate of the will was sent to them, and they, after consulting their solicitors, requested Mr. and Mrs. Chance to sign a new memorandum of deposit of the deeds. This was done on the 26th of January, 1878, the new memorandum stating that the deeds were deposited with the bank as a continuing security to them for moneys advanced by them to Henry Chance, whether on current account or otherwise. In April, 1878, Mrs. Chance died. The deeds were still with the bank, and at that time Chance's account was not overdrawn. He afterwards received credit from the bank on the security of the deposit. After the death of his wife, Henry Chance continued to reside in one of the leasehold houses, and received the rents of the others. The son of his wife by her former marriage, who was an infant, lived with him and was maintained by him. In the year 1883 Jones was informed of some remark which Chance had made in the market place about the property, and this induced him to make inquiry about the deeds of a Mr. King, a solicitor, who had prepared the settlement, and in whose custody Jones up to this time believed that the title deeds of the property were. Inquiries were made, and it was then for the first time discovered that the deeds were with the bank. In April, 1883, Jones gave notice of the settlement to the bank, and claimed the deeds from them. This was the first notice which the bank had of the settlement. The bank insisted that their charge was entitled to priority, and they brought this action against Jones and the infant T. J. Adams, claiming a declaration that they were entitled to a valid equitable mortgage of the property, and asking for foreclosure or sale. Chance had filed a liquidation petition. Before the trial of the action, both he and King had died.

Cozens-Hardy, Q. C., and *W. Pipson Beale*, for the plaintiffs.

C. H. Turner, and *Gover*, for the defendants.

PEARSON, J. The question is, whether under the circumstances, the bank are entitled, although they are only equitable mortgagees, to priority over the legal estate vested in the trustee of the settlement. It is said that the infant defendant has a better equity than the trustee has. I demur to that proposition entirely. I think I should be introducing a most fatal doctrine if I were to say that, when the legal estate in property is vested in a trustee under a marriage settlement, the simple fact that his *cestuis que trustent* are ignorant of what he is doing gives them a prior equity over any person who has dealings with him, and who is equally ignorant of the existence of the settlement and of the rights of the *cestuis que trustent*. The question is, there being two equities, and one of them clothed with the legal estate, which of them is entitled to priority. The defendants' counsel have argued that the equity of the *cestui que trust* is prior in time to that of the bank, because they say the equity of the *cestui que trust* arose on the 25th of May, or at all events on the 29th of May, 1877, whereas the equity of the bank, arising under the second memorandum, did not come into *esse* until the 26th of January, 1878, and if the equities are equal, then *qui prior est tempore potior est jure*. But the first question I have to determine is whether the equities are equal.[1]

I think, upon the authorities which have been cited, and which are so well known, that it would be pedantry for me to go over them again, the doctrine of this court has always been, that, where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them, and under these circumstances I must decide that the banking company, although only equitable mortgagees, are entitled to priority over the defendants for the amount due to them or their security at the time when they received notice of the settlement.[2]

Pt.

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[1] The learned judge found that the trustee had been negligent, and that the Banking Company had acted with reasonable caution. His opinion on these points is omitted, as well as the arguments of counsel. — ED.

[2] There is an adverse criticism of this case in 30 Sol. J. 72. — ED.

SECTION II. (*continued*).

(*e*) CESTUI QUE TRUST CANNOT VOTE AS OWNER OF THE RES.

IN THE MATTER OF THE APPLICATION OF JACOB BARKER, RELATIVE TO THE ELECTION OF DIRECTORS OF THE MERCANTILE INSURANCE COMPANY OF NEW YORK.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1831.

[*Reported in* 6 *Wendell*, 509.]

AN election of directors of the Mercantile Insurance Company of New York was holden on the 10th of January, 1831. Jacob Barker demanded to vote on 1,290 shares of stock standing in his name on the books of the company, 1,255 in his own right, and 35 as trustee for his minor children. His vote was challenged, and the challenge allowed by the inspectors. Had he been permitted to vote on the whole number of shares standing in his name, Samuel Hazard, and six other persons named in the proceedings, who the inspectors certified were duly elected, would not have been elected, but seven other persons, for whom Jacob Barker offered to vote, would have been elected in their stead; or had he been permitted to vote only on the 35 shares held by him as trustee, the effect would have been to have given a majority of votes to four individuals, who were voted for at the election as directors, and who were not returned as elected over Samuel Hazard and five other persons, who had an equal number of votes, and who were returned duly elected. The objection to Barker's voting on the 1,255 shares was, that they were hypothecated to the company to their full value. The company was incorporated in 1818. This case also presented the question whether an alien stockholder of this company has the right to vote by proxy, such vote having been offered and rejected by the inspectors.[1]

The case was argued by

Jacob Barker, in *pro. per.* for the motion.

W. H. Bulkley, contra,

BY THE COURT, SAVAGE, C. J. In the case *Ex parte* Holmes,[2] we set aside an election of directors of an insurance company, because a trustee had been allowed to vote upon stock belonging to the company; not because a trustee had been permitted to vote instead of the *cestui que trust*, but for the reason that the stock in that case could not be voted upon, it being the property of the company, controlled by its officers; and we held, that neither within the meaning of the charter of the company, nor of the act under which the proceedings were had, could it be tolerated, that the officers of a moneyed institution should wield such stock, however obtained, to control the result of an election of directors.[1] Such is the principle settled by that case, and what was said in relation to the rights of a trustee or *cestui que trust* to vote on stock, standing in the name of the trustee, either generally or specially, in his representative character, was said in reference to the peculiar circumstances of the case. The court never could have doubted the right of a person to vote upon stock standing in his name, although held by him in trust for another; the legal estate is in him, and until divested by assignment, either voluntary or compulsory, he is the only person entitled to vote.[2] Indeed, the case *Ex parte* Holmes admits that if the stock stands in the name of the trustee without expressing any trust, he has the right to vote. Jacob Barker, therefore, was entitled to vote upon the 35 shares holden by him as the trustee of his minor children.

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[1] So much of the case as relates to this question is omitted. — ED.

[2] 5 Cow. 426.

He was also entitled to vote upon the 1,255 shares standing in his name in his own right, although they were hypothecated to their full value.[1] So was the decision of the court in *Ex parte* Willcocks,[2] where we held, that until the pledge was enforced, and the title made absolute in the pledgee, and the name changed on the books, the pledgor should be permitted to vote.[3] The restriction in the Revised Statutes, that hypothecated stock shall not be voted upon, applies only to corporations created, renewed, or extended subsequent to 1st January, 1828. The Mercantile Insurance Company was created long previous to that date.

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[1] American Co. *v.* Haven, 101 Mass. 402 *Accord.* — Ed.

Pa. 217

[2] Newry Co. *v.* Moss, 14 Beav. 64, 67 (*semble*); *Re* Stanton Co., 16 Eq. 559; Pender *v.* Lushington, 6 Ch. D. 70; Moffat *v.* Farquhar, 7 Ch. D. 591; Moore *v.* Jones, 3 Woods C. C. 53, 55 (*semble*); *Re* Mohawk Co., 19 Wend. 135; *Re* Long Island Co., 19 Wend. 37; Adderly *v.* Storm, 6 Hill, 624, 628; North Shore Co., 63 Barb. 556; Wilson *v.* Central Co., 9 R. I. 590 *Accord.* But if a trustee would, by voting against the wishes of the *cestui que trust*, cause irreparable mischief to the latter, a court of equity would issue an injunction to restrain the trustee from so voting. McHenry *v.* Jewett, 90 N. Y. 58. See also Vowell *v.* Thompson, 3 Cranch, C. C. 428; Wilson *v.* Central Co., 9 R. I. 590; Hoppin *v.* Buffum, 9 R. I. 513 "The trustee, as the legal proprietor, had originally the right of voting for coroners. Burgess *v* Wheate, 1 Eden, 251; (*a*) but by 58 Geo. III. c. 95, § 2, it was transferred to the *cestui que trust* in possession. This act, however, was repealed, 7 & 8 Vict. c. 92, [and the matter stood as it did before any legislative interference. Regina *v.* Day, 3 Ell. & Bl. 859. Coroners are not now elected by the freeholders, 51 & 52 Vict. c. 41, § 5.]

N.Y.

R.I. 551

"So the trustee was the person entitled at common law to vote for members of Parliament. Burgess *v.* Wheate, 1 Eden, 251, per Lord Northington. But by the seventy-fourth section of 6 & 7 Vict. c. 28, it is enacted, that 'no trustee of any lands or tenements shall in any case have a right to vote in any such election for or by reason of any trust estate therein, but that the *cestui que trust* in actual possession or in the receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, shall and may vote for the same notwithstanding such trust;' and by the fifth section of 30 & 31 Vict. 102, the right of voting is conferred upon persons who are seised at law or in equity of lands or tenements of the yearly value of five pounds." Lewin, Trusts (9th ed.) 247–248. See Spencer *v.* Harrison, 5 C. P. D. 97.

The trustee has the right of appointing the steward of a manor. Mott *v.* Buxton, 7 Ves. 201; and the right of presentment to an advowson; Anon., Keilw., 160 b.; Anon., Keilw. 47, pl. 2; *Re* Shrewsbury School, 1 M. & Cr. 632, 647. But in both cases the trustee should act in accordance with the wish of the *cestui que trust.* Lewin, Trusts (9th ed.), 246. — Ed.

(*a*) And Lord Northington added for "sheriffs" (Burgess *v.* Wheate, 1 Eden, 251), but the election of sheriffs had been transferred from the people to the chancellor, treasurer, and judges, by 9 E. II. st. 2, before the establishment of trusts.

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A rule must therefore be entered declaring null and void the election of Samuel Hazard and the six other persons, who would have had a minority of votes had the vote of Jacob Barker been allowed; and that William Israel and the six other persons for whom Jacob Barker offered to vote, and who would have had a majority of the votes had the vote of Jacob Barker been received, are duly elected directors of the company.[4]

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[1] Merchants' Bank *v.* Cook, 4 Pick. 405; Hoppin *v.* Buffum, 9 R. I. 513 *Accord.* — Ed.

[2] 7 Cow. 402.

[3] Scholefield *v.* Union Bank, 2 Cranch, C. C. 115 *Accord.*

A registered pledgee has the right to vote. Moore *v.* Jones, 3 Woods, 53, 55; Adderly *v.* Storm, 6 Hill, 624, 628; Hoppin *v.* Buffum, 9 R. I. 513. But see *contra*, Miller *v.* Murray (Colo. 1892), 30 Pac. R. 46 (statutory); McDaniels *v.* Flower Co., 22 Vt. 274. — Ed.

[4] Meaning of "Owner" in Various Statutes. — The context must determine in each case in what sense the term "owner" is employed. But, in general, the word is used to designate the trustee rather than the *cestui que trust.* E. g.: —

Trust property in the possession of the trustee does not pass, upon his bankruptcy, to his assignees under the English Bankruptcy Acts, as property left in the order and disposition of the bankrupt by the consent and disposition of the true owner. Copeman *v.* Gallant, 1 P. Wms. 314; Joy *v.* Campbell, 1 Sch. & Lef. 328; *Ex parte* Horwood, Mont. & M. 169; Mont. 24; *Ex parte* Thomas, 3 M., D. & D. 40, 48 (*semble*); *Ex parte* Geaves, 8 D., M. & G. 291; *Re* Bankhead's Trust, 2 K. & J. 560; Great Eastern R. R. *v.* Turner, L. R. 8 Ch. Ap. 149 (explaining and distinguishing *Ex parte* Burbridge, 1 Dea. 131; s. c. sub nom. *Ex parte* Watkins, 2 Mont. & A. 348; *Ex parte* Ord, 2 Mont. & A. 724). In *Re* Bankhead's Trust, *supra*, Sir W. Page Wood, V.-C., said, p. 565: "If you once get a sufficient declaration of trust by a party who is the sole trustee, he is the proper person to be in possession of the policy, — in other words, he is the 'true owner,' within the meaning of the act; and he being also in the reputed possession of the property when the bankruptcy takes place, there is no separation of interest, — the true owner and the reputed owner are the same person." But the assignee of a chose in action or equitable interest, on the other hand, is regarded as the "true owner" within those acts. Accordingly, if the assignee fails to notify the obligor of the assignment, the chose in action or other interest assigned will pass upon the bankruptcy of the assignor to the latter's assignees in bankruptcy, and that, too, although the instrument containing the obligation was delivered to the assignee at the time of the assignment. See cases cited in Ames, Cases on Trusts (1st ed.), 561, 562, n. chngd now by stat Robson, Bankruptcy, 7E 323-24.

So also in the Bills of Sale Act, 45 & 46 Vict. c. 43, § 5; *Re* Sarle, '92, 2 Q. B. 591. For other instances see McIntyre *v.* Easton Co., 28 N. J. Eq. 425; Nat. Co. *v.* Eastern Co., 36 N. J. 181. In Tutt *v.* Railway Co., 28 S. C. 388, "owner" was thought to apply to the *cestui que trust;* in People *v.* Coleman, 119 N. Y. 137, the word was thought to designate one who had the beneficial interest as well as the legal title. — Ed.

SECTION II. (*continued*).

(*f*) THE BURDENS INCIDENT TO OWNERSHIP FALL UPON THE TRUSTEE, AND NOT UPON THE CESTUI QUE TRUST.

TRINITY COLLEGE IN CAMBRIDGE *v.* BROWNE.

IN CHANCERY, BEFORE LORD JEFFREYS, C., FEBRUARY 27, 1686.

[*Reported in* 1 *Vernon*, 441.]

THE bill was to discover the best beast of *cestui que trust* of a college lease: the defendant demurred, for that the best beast of the *cestui que trust* could not be taken for a heriot: and it also appeared of the plaintiff's own showing that the tenants, who had the estate in law in them, were yet living. *The demurrer was allowed.*[1]

JOHN H. B. LATROBE, TRUSTEE, *v.* THE MAYOR AND CITY COUNCIL OF BALTIMORE.

IN THE COURT OF APPEALS, MARYLAND, OCTOBER 27, 1862.

[*Reported in* 19 *Maryland Reports*, 13.]

COCHRAN, J., delivered the opinion of the court.[2] This is an appeal from a judgment obtained in a suit at law, brought to recover taxes assessed on mortgages of property in the city of Baltimore, made to the appellant as trustee of the estate of Joseph Thornburg, deceased. At the time of the assessment and institution of the suit the appellant was a resident of Howard County, the *cestui que trusts* being, at the same time, residents of Baltimore City, and the question as to the liability of the appellant for the taxes assessed is the only one presented.

We are not aware that the acts of assembly, regulating the imposition and collection of taxes, have effected any modification of the rules of law, which otherwise must govern the determination of this question. The appellee, in resorting to its remedy at law, assumes that the taxes assessed constitute a legal cause of action, and that the appellant, as the holder of the legal title of the property upon which the assessment was made, is liable for its satisfaction. That taxes assessed upon a trust estate constitute a legal cause of action against the holder of the legal title we do not doubt, for at law the legal estate in the hands of a trustee has the legal incidents and obligations of an absolute title, subject only to the claims in equity of the *cestui que trust.*[1] Crabb on Real Property, 55 Law Lib. 399; 97 Law Lib. 257; Willis on Trustees, 10 Law Lib. 21, 72, 83; Denton *v.* Denton.[2]

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[1] So the trustee, and not the *cestui que trust* of a copyhold, must pay the fine on admission. Earl of Bath *v.* Abney, 1 Dick. 260, 1 Burr. 206, s. c.; Londesborough *v.* Foster, 3 B. & S. 805; Hall *v.* Bromley, 35 Ch. Div. 642, 655, per Lindley, L. J.. "Admittance and the right to admittance depend upon the legal estate, and the lord can look at that only, and has nothing to do with any equitable devolution of title." — ED.

[2] See *supra*, 70, n. 1. — ED.

In this case, the appellant was the holder of the legal estate upon the valuation of which the taxes sought to be recovered were imposed, and upon our construction of the thirteenth article of the Bill of Rights, as well as upon the general rule stated, he was the proper person to be assessed for their payment. The declaration in that article of the duty or obligation of every person holding property in the State to contribute his proportion of public taxes, according to his actual worth in real or personal property, must be understood as intending and meaning a legal obligation to contribute to the public taxes, according to actual worth, and in that sense the obligation for the payment of taxes falls upon the trustee or holder of the naked legal title. Upon this construction the obligation of one entitled to the beneficial interest of property held by a trustee, to contribute to the public taxes, according to actual worth, is none the less satisfied; for in such a case the assessment of the tax to the holder of the legal estate, through him, reaches and fastens upon the interest of the beneficial owner. In our opinion, a like construction should be given to the provisions of the acts of 1841, c. 23, 1847, c. 246, and 1852, c. 327, requiring all property owned by persons residents of this State, and not permanently located elsewhere within the State, to be valued to the owner in the county, district, or city wherein he or she may reside, or, in other words, that these provisions contemplate and mean the holding or ownership of the legal estate of the property to be valued, without regard to the ownership of the equitable title or use. Adopting this view, we have then to ascertain the location of the property for which the taxes claimed were assessed, in order to dispose of the question presented. Upon the principle that the possession of personalty follows the person owning the legal title, the mortgages, on the valuation of which the assessment of the taxes in this case was made, so far as they could be made the basis of an assessment, were beyond the jurisdiction of the appellee. The assessment, in such cases, is made upon the amount of the mortgage debt, and not upon the value of the property mortgaged to secure it. As the basis of the assessment is the amount of the debtor's obligation to the creditor, the recording of a mortgage in another county or district than that of the creditor's residence, collaterally securing its satisfaction, cannot have the effect of locating the debt where the mortgage is recorded.

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[1] Regina *v.* Sterry, 12 A. & E. 84; Queen *v.* Stapilton, 4 B. & S. 629; Ring *v.* Ewing, 47 Ind. 246; Tax Court *v.* Gill, 50 Md. 377; Dorr *v.* Boston, 6 Gray, 131; Richardson *v.* Boston, 148 Mass. 508; Ball *v.* Sawyer, 59 N. H. 393; People *v.* Assessors, 40 N. Y. 154 (compare People *v.* Coleman, 119 N. Y. 137); Lewis *v.* Chester, 60 Pa. 325; Anthony *v.* Caswell, 15 R. I. 159; *Re* Ailman (R. I. 1891), 22 Atl. R. 279 *Accord.* In some jurisdictions, taxes on personal property held in trust are payable by the trustees, but, by statute, at the place of residence of the *cestui que trust.* Anthony *v.* Caswell, 15 R. I. 159; *Re* Ailman (R. I. 1892), 22 Atl. R. 279. Personalty held in trust by a foreign trustee is not, as a rule, taxable either to the trustee or *cestui que trust,* although the latter resides within the jurisdiction. Dorr *v.* Boston, 6 Gray, 131; Anthony *v.* Caswell, 15 R. I. 159.

Similarly the trustee and not the *cestui que trust* is the proper party defendant upon other obligations incident to the ownership of the trust-*res*; e. g. covenants running with the land. White *v.* Hunt, L. R. 6 Eq. 32; assessments upon shares in a stock company; Newry *v.* Moss, 14 Beav. 64; Holt's Case, 1 Sim. N. S. 389; Fenwick's Case, 1 De G. & Sm. 557; Price *v.* Brown, 3 De G. & Sm. 146; *Re* Leeds Co., 12 Jur. N. S. 60; Hoare's Case, 2 J. & H. 229; Imperial Association, 3 Eq. 361; *Ex parte* Oriental Bank, 3 Ch. 791; Mitchell's Case, 9 Eq. 363; Hemming *v.* Maddick, 7 Ch. 395, 9 Eq. 175; Ind's Case, 7 Ch. 485; Gillespie *v.* Glasgow Bank, 4 App. Cas. 632; Muir's Case, 4 App. Cas. 337; Hughes-Hallett *v.* Indian Co., 22 Ch. D. 561; Lumsden *v.* Buchanan, 4 Macq. 950; Wolf *v.* St. Louis Co., 15 Cal. 319; McKim *v.* Glenn, 66 Md. 479; Crease *v.* Babcock, 10 Met. 525; Grew *v.* Breed, 10 Met. 569; *Re* Empire Bank, 18 N. Y. 199; Stover *v.* Flack, 30 N. Y. 64; Mann *v.* Currie, 2 Barb. 294. — ED.

[2] 17 Md. 403.

We think the taxes sought to be recovered in this case were assessed without authority, and therefore reverse the judgment.

Judgment reversed.

JOHN SCHWAB, RESPONDENT, *v.* FREDERICK E. CLEVELAND, A TRUSTEE, ETC., APPELLANT, AND ANOTHER.

IN THE SUPREME COURT, NEW YORK, DECEMBER TERM, 1882.

[*Reported in* 28 *Hun*, 458.]

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

The action was brought to recover damages for injuries done to the plaintiff's premises by the escape of water from a leader upon the house or the premises owned by the defendant Cleveland, as trustee.

J. Hampden Dougherty and *Frederick E. Cleveland*, for the appellant.

Dorland & Hess, for the respondent.

BARNARD, P. J. There is considerable conflict of authority as to the necessity of notice and request to remove a nuisance, where the same was created by a previous grantor of the owner sued. The weight of the cases seems to be in favor of notice, but against a request to remove.[1]

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[1] Conhocton Stone R. *v.* Buffalo, N. Y. and Erie R. R., 51 N. Y. 573.

This case is not one, however, in which that principle can be invoked. The evidence shows that the defendant's grantor carried the water from her roof through a pipe into the drain along or very near plaintiff's premises. It was imperfectly built, for it began to leak into plaintiff's premises soon thereafter. The premises were conveyed to defendant as trustee in 1878, and he has since owned them. During all that time he has failed to protect the plaintiff from this leak. When the owner of premises collects the water which naturally falls upon the same into one place, and conducts it from there by a pipe to his drain, he undertakes, at all hazards, that his pipe shall be both sufficient and shall continue so as to the adjoining owner. It is, therefore, no answer to the plaintiff's claim, for the defendant to say that he did not know of the leak. He was bound to do his duty by his own premises. It is the owner who is liable and never the tenant in possession unless the tenant has agreed to keep in repair.[1] . . .[2]

There is no force in the objection, that the defendant cannot be made liable as trustee. He owns as trustee, and owes the duty as owner to keep his pipes and drains from injuring his neighbor by reason of faulty construction or from being suffered to get in bad repair. (Whether as between himself and the beneficiary he can collect the damage from the trust estate is a question not now before us.)

Upon the whole case the judgment should be affirmed, with costs.[3]

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[1] Bellows *v.* Sackett, 15 Barb. 96.

[2] A portion of the opinion foreign to trusts is omitted. — Ed.

[3] Norling *v.* Allee, 10 N. Y. Sup. 97, 13 N. Y. Sup. 791 *Accord.* The *cestui que trust* is not indictable for a nuisance; People *v.* Townsend, 3 Hill, 479, in which case the opinion of the court is stated as follows by Bronson, J.: "The prosecution must fail, for the defendants are not the owners of the property. Burnett is the owner. The admission is, 'that the *title in fee* was held by Moses D. Burnett as trustee for the defendants, who are *cestuis que trust* of the property.' If 'the title in fee' is in Burnett, it is of no importance that he holds as a trustee, or that the defendants are beneficially interested in the trust. Under our code, those trusts which pass the title to the land 'vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust;' and 'the persons for whose benefit the trust is created take no estate or interest in the lands, but may enforce the execution of the trust.' 1 R. S. 729, § 60. If the fact be, as was suggested on the argument, that Burnett has nothing more than a power in trust to sell and convey, then the defendants are owners of the property, and the admission on the trial that 'the title' was in Burnett must have happened through inadvertence. But we must take the case as it stands, and then I see no principle on which the prosecution can be maintained. When the title passes to the trustee, he takes the rents and profits of the land, and if he uses or permits the property to be used in a mode which proves injurious to the public, it is his fault, and he must answer for it." Compare Eisenbrey *v.* Pa. Co., 141 Pa. 566. — Ed.

CHAPTER III.

THE TRANSFER OF TRUST PROPERTY.

SECTION I.

By Act of the Party.

(*a*) BY ACT OF THE TRUSTEE.

NOTE.

IN THE ——, 1453.

[*Reported in Fitzherbert's Abridgment, title Subpœna, placitum* 19.]

IF I enfeoff a man to perform my last will and he enfeoffs another, I cannot have a subpœna against the second because he is a stranger, but I shall have a subpœna against my feoffee and recover in damages for the value of the land. Per *Yelverton* and *Wilby*, clerks of the rolls, who said that if my feoffee in confidence enfeoffed another upon confidence of the same land, that I should have a subpœna against the second, but otherwise when he was enfeoffed *bona fide*, for then I am without remedy, and so it was adjudged in the case of the Cardinal Winchester.[1]

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[1] Anon. (1502) Keilw. 46, b, pl. 7. Per Frowike, C. J.: "If he [the feoffee to uses] makes a feoffment over, the feoffor [i. e. the *cestui que use*] has no remedy against the feoffee; the same law if he dies, the heir of the feoffee is seised as I think to his own use, for the confidence which the feoffor put in the person of his feoffee cannot descend to his heir nor pass to the feoffee of the feoffee, but the latter is feoffee to his own use as the law was taken until the time of H. [E ?] IV. But if the second feoffee has notice of the use, they in the chancery will reform this by *subpœna* at this day; and the heir of the feoffee upon confidence was seised to his own use until the commencement of E. IV., and then the *subpœna* began against the heir and against the feoffee of the feoffee." — ED.

ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1522.

[*Reported in Year Book*, 14 *Henry VIII.*, *folio* 4, *placitum* 5.]

ONE J. S. sued a replevin for his cattle tortiously taken.

The defendant avowed for that J. D. and J. B. were seised of a ploughland of land in their demesne as of fee to the use of R. N. by the feoffment of R. &c., and being so seised granted an annual rent out of the said ploughland to A. by the name of Alice, wife of R., to hold during the term of her life, with a clause of distress, and afterwards Alice married the defendant, before the taking, and for so much in arrear he avowed the taking, &c.

To which the plaintiff said that J. D. and J. B. were seised to the use of W. N., and being so seised granted the said rent to the said A. as alleged, she then having notice of the use, that the said J. D. and J. B. enfeoffed one Halpenny in fee, whereby he was seised, and being so seised, and Alice also being seised of the rent, the said W. N. by his deed released all his right to the said Halpenny to him and his heirs forever *absque hoc* that J. D. and J. B. were seised to the use of R. N. as the avowant has alleged, &c., and prays judgment if this avowry, &c.

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FITZ HERBERT, J. First it is to be seen to whose use the grantee shall be seised.[1] I think he shall be seised to the first use, notwithstanding he had no notice, for uses are at common law and not by the statutes of Richard, and a use is but a trust and confidence which feoffor puts in his feoffee according to the estate which was at common law, for if a woman seised of land at common law will upon a communication of marriage enfeoff one, if he does not perform the trust the law gives her a remedy to recover her land back by a writ of entry *causa matrimonii prælocuti*. And so if I will that my executor sell my land which is devisable, if he will not, but takes the profits to his own use, the heir may enter upon him for the non-performance of his trust, as was adjudged in 38 Lib. Ass. p. 3. And then the trust is a necessity, for a dead man cannot perform his own will. But, sir, in this present case this feoffment in trust was only a pleasure and not a necessity, but still he is as much bound in conscience to perform his will as the executor, since he took the estate to do it, and if he deceives him no one will say that he does well. At the common law the feoffor had no remedy except by subpœna, but now by the statute [1 Rich. III. c. 1, (1483)] he may enter and make a feoffment according to his will, if his feoffee will not do his will. But how a use shall be changed depends upon the common law and upon the estate of the feoffee, for if I enfeoff B. to hold to him his heirs and assigns, my trust and confidence are in him, his heirs and assigns and this is easily shown, for the heirs will be bound to perform the feoffor's will as much as the father, and the second feoffee as much as the first, if there is no consideration, and so it is if the feoffee suffer a recovery without a consideration. For it shall be intended since he parted with the land without consideration that he parted with it in the most proper way, i. e. to hold it as he held. For when an act rests in intendment and is indifferent, the law makes the most favorable presumption, for if I see a priest and a woman together suspiciously, still as long as there is doubt whether he is doing good or evil the former is to be presumed, and so here. And, sir, the rent is, in a manner, part of the land, and here the trust was in the land out of which the rent was granted, and this grant is without consideration, and it may be granted to the first use, wherefore it shall be so intended. And although the rent was not *in esse* and he had no use in it before, still he may have the use. For I take it clearly if one is seised of a seigniory in gross and grants it to his use, if the land escheats, that the feoffee shall nevertheless be seised to the first use, for it comes in lieu of the seigniory: and yet he had no use in the land before; and so one may grant for term of life and express the use.

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[1] Only so much of the opinion of the court as relates to this point is given. The replication was held insufficient. The opinion of Brudenel, J., is omitted. — ED.

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BROKE, J., to the same intent. Sir, as the feoffor puts confidence and trust, so shall be his use, and the use is in the feoffor in conscience although the feoffee has the land by the common law. And so it is not like an estate upon condition at common law, for the whole inheritance is in the feoffee, and if he dies without heir, the feoffor cannot enter; but if he gives the land in tail and the donee dies without heir, he may enter, and every dealing with the land should be according to the wish of the feoffor. For if the feoffee acts otherwise, he is chargeable in conscience, and so is the heir of the feoffee; and the feoffee of the feoffee, if there is no consideration; and so is he who comes in by fine and false recovery. *Scilicet*, those recoveries in a writ of entry in the *post*. For in all these cases it is the act of the feoffee, and being without consideration the law intends that it was according to the first use; and, sir, conscience does not make the use, but common reason, which is common law, which is indifferent to all laws spiritual and temporal; and, sir, although common reason says that if I enfeoff one without consideration, this shall be to my use, still this land shall be in the feoffee like any other land and take the same course: for if he has a wife and dies, his wife shall have dower to her own use, for here there is no act of the feoffee and she does not claim by the feoffee, but the law makes her estate; and so if he is bound in a statute merchant; and so in case of a lord taking by escheat, for in these cases there was no act by the feoffee to deceive or defraud the feoffor, but it was done by order of the law. And, sir, the notice, as here, is the important matter, for if there was no notice there would be no use, but if he has notice, he is *particeps criminis*.

POLLARD, J., to the same intent. As has been said uses were at the common law and are nothing more than confidence and trust, and the feoffee is bound to act according to the trust, otherwise he would deceive his feoffor, which would not be reason. And there is a diversity when there is a default in the feoffee in deceiving the feoffor, and when not, for if the feoffee die his wife shall have dower, and so in case of a statute merchant or escheat, for there is no default in feoffee, but the operation of law. But the default is in me, and although my feoffee is bound in a statute merchant, still I can enter and make a feoffment and the execution is discharged. And so if my feoffee endowed his wife *ad ostium ecclesiœ* and I re-enter, it is void, for the feoffee took the estate by my feoffment, and not by law. And if the feoffees enfeoff one without consideration, it is the first use unless it be without notice; but if upon consideration without notice the use is changed, and if with notice, though upon consideration, the first use remains; and this is the diversity.

NOTE.

1538.

[*Reported in Brooke's New Cases, March's Translation*, 95.]

By FITZHERBERT, J. If the feoffees to the use of an estate tail sell the land to him that hath notice of the first use, yet the buyer shall not be seised to the first use, but to his own use, by reason of the bargain and sale, for the feoffees have the fee simple, and therefore their sale is good.[1]

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[1] "'T is holden that if the feoffees seised to the use of an estate tail, or other use, are impleaded, and suffer the common recovery against them upon bargain, this shall bind the feoffees and their heirs and *cestuy que use* and his heirs, where the buyer and recoveror hath not conusance of the first use: And by Fitzherbert it shall bind, tho' they had notice of the use; for the feoffees have the fee-simple." Bro. New Cases, March's Transl. 91. "Feoffees in use make a lease for years, rendering rent, to another who hath notice of the first use, yet the lease shall be only to the use of the lessee himself. And the same law *per plures* though no rent be recovered." Bro. New Cases, March's Transl. 92. See also 1 And. 314, 2 And. 82. — ED.

NOTE.

PURCHASE FOR VALUE WITHOUT NOTICE.

THE principle that one who purchases a legal title from a trustee for value and without notice of the trust acquires the title discharged from the trust is fundamental. Y. B. 33 Hen. VI. f. 15, pl. 6; Y. B. 7 Hen. VII. f. 12, pl. 2; Bro. Ab. Feff. al Uses, pl. 50; Robes *v.* Bent, Moo. 552; Reynell *v.* Peacock, 2 Rolle, R. 105; Rooke *v.* Staples, Cary, 108; Clifford *v.* Langham, Tothill, 21; Cole *v.* Moore, Moore, 806; Harding *v.* Hardrett, Finch, 9; Salsbury *v.* Bagott, 2 Swanst. 608; Ferrars *v.* Cherry, 2 Vern. 384; Mertens *v.* Jolliffe, Amb. 311; Willoughby *v.* Willoughby, 1 T. R. 763; Plumb *v.* Fluitt, 2 Anst. 432; Jones *v.* Powles, 3 M. & K. 581; Thorndike *v.* Hunt, 3 De G. & J. 563; Pilcher *v.* Rawlins, L. R. 7 Ch. Ap. 259; Heath *v.* Crealock, L. R. 10 Ch. Ap. 22; Cave *v.* Cave, 15 Ch. D. 639; Kettlewell *v.* Watson, 21 Ch. D. 685; Taylor *v.* Blacklock, 32 Ch. D. 560; Garnham *v.* Skipper, 55 L. J. Ch. 263; Wright *v.* Leys, 8 Ont. 88; Monckton *v.* Braddock, Ir. R. 7 Eq. 30 (*semble*); Bayley *v.* Greenleaf, 7 Wheat. 46; Johnson *v.* Sirmans, 69 Ga. 617; Williams *v.* Swift, 79 Ga. 709; Vattier *v.* Hinde, 7 Pet. 252 (*semble*); Boone *v.* Chiles, 10 Pet. 177 (*semble*); Lea *v.* Polk Co., 21 How. 493; Williams *v.* Jackson, 107 U. S. 478; Townsend *v.* Little, 109 U. S. 504; Colo. Co. *v.* U. S., 123 U. S. 307; Dexter *v.* Harris, 2 Mason, 531; Fenno *v.* Sayre, 3 Ala. 458; Mundine *v.* Pitts, 14 Ala. 84; Mobile Co. *v.* Randall, 71 Ala. 220; Turner *v.* Wilkinson, 72 Ala. 361; Ricks *v.* Reed, 19 Cal. 551; Warnock *v.* Harlow (Cal. 1892), 31 Pac. R. 166; Moye *v.* Waters, 51 Ga. 13; Fahn *v.* Bleekley, 55 Ga. 81; McCaskill *v.* Lathrop, 63 Ga. 96; Prevo *v.* Walters, 5 Ill. 35; Betser *v.* Rankin, 77 Ill. 289; Dickerson *v.* Evans, 84 Ill. 451; Irish *v.* Sharp, 89 Ill. 261; Bradley *v.* Luce, 99 Ill. 234; McDavid *v.* Call, 111 Ill. 298; Goodtitle *v.* Cummins, 8 Blackf. 179; Brown *v.* Budd, 2 Ind. 442; Beckett *v.* Bledsoe, 4 Ind. 296; Crane *v.* Buchanan, 29 Ind. 570; Hampson *v.* Fall, 64 Ind. 382; Catherwood *v.* Watson, 65 Ind. 576; Derry *v.* Derry, 74 Ind. 560; Gray *v.* Coan, 40 Iowa, 327; Farmers' Bank *v.* Fletcher, 44 Iowa, 252; Lindsey *v.* Rankin, 4 Bibb, 482; Moore *v.* Dodd, 1 A. K. Marsh. 140; Owings *v.* Jouitt, 2 A. K. Marsh. 380; Halstead *v.* Bank of Ky., 4 J. J. Marsh. 554; Desha *v.* Jones, 6 La. An. 743; Hagthorp *v.* Hook, 1 Gill & J. 270; Molony *v.* Rourke, 100 Mass. 190; Hull *v.* Swarthout, 29 Mich. 249; Cogel *v.* Raph, 24 Minn. 194; Fulton *v.* Woodman, 54 Miss. 158; Digby *v.* Jones, 67 Mo. 104; De Groot *v.* Wright, 1 Stock. 55; Hogan *v.* Jaques, 19 N. J. Eq. 123; Demarest *v.* Wynkoop, 3 Johns. Ch. 129, 147; Whittick *v.* Kane, 1 Paige, 202; Newton *v.* McLean, 41 Barb. 285; Dillaye *v.* Comm. Bank, 51 N. Y. 345; Valentine *v.* Lunt, 115 N. Y. 496; Wilson *v.* Western Co., 77 N. C. 445; Ludlow *v.* Kidd, 3 Ohio, 541; Billington *v.* Welsh, 5 Binn. 129; Scott *v.* Gallagher, 14 S. & R. 333; Sweetzer *v.* Atterbury, 100 Pa. 18; Rupp's App., 100 Pa. 531; Hughson *v.* Mandeville, 4 Dess. 87; Lewis *v.* Taylor, Riley, Ch. 179; Jones *v.* Hudson, 23 S. C. 494; Perkins *v.* Hays, Cooke, 163; Bass *v.* Wheless, 2 Tenn. Ch. 531; Chadwell *v.* Wheless, 6 Lea, 312; Stewart *v.* Greenfield, 16 Lea, 13; Flanagan *v.* Oberthier, 50 Tex. 379; Pepper *v.* Smith, 54 Tex. 115; Richardson *v.* Levi, 67 Tex. 359; Tompkins *v.* Powell, 6 Leigh, 576; Carter *v.* Allan, 21 Grat. 241.

If a *bona fide* purchaser has the conveyance made to another in trust for him, the defrauded *cestui que trust* is as remediless as in the case where the purchaser takes the title in his own name. This is an illustration of the rule that an innocent purchaser is protected if he has either the title or the best right to call for it. Wilks *v.* Boddington, 2 Vern. 599; Willoughby *v.* Willoughby, 1 T. R. 763; Kenicott *v.* Supervisors, 16 Wall. 452; New Banking Co. *v.* Montgomery, 95 U. S. 16; Willis *v.* Henderson, 5 Ill. 13; Stokes *v.* Riley, 121 Ill. 166; Peoria Co. *v.* Thompson, 103 Ill. 187.

PURCHASE WITH NOTICE FROM A PURCHASER FOR VALUE WITHOUT NOTICE. — A purchaser with notice from a purchaser for value without notice acquires the rights of the latter. Harrison *v.* Forth, Prec. Ch. 51; Salsbury *v.* Bagott, 2 Swanst. 608;

Ferrars *v.* Cheney, 2 Vern. 385; Brandlyn *v.* Ord, 1 Atk. 571; Lowther *v.* Carlton, 2 Atk. 242; Mertins *v.* Jolliffe, Amb. 313; Sweet *v.* Southcote, 2 Bro. C. C. 66; McQueen *v.* Farquhar, 11 Ves. 467, 478; Kettlewell *v.* Watson, 21 Ch. D. 685; Alexander *v.* Pendleton, 8 Cranch, 462; Myers *v.* Peek, 2 Ala. 648; Wilkinson *v.* Solomon, 83 Ala. 438; Scott *v.* Orbison, 21 Ark. 202; Fargason *v.* Edrington, 49 Ark. 207; Doyle *v.* Wade, 23 Fla. 90; Truluck *v.* Peoples, 3 Ga. 446; Chance *v.* McWhorter, 26 Ga. 315; Johns *v.* Sewell, 33 Ind. 1; McShirley *v.* Birt, 44 Ind. 382; Evans *v.* Nealis, 69 Ind. 148; Chambers *v.* Hubbard, 40 Iowa, 432; East *v.* Pugh, 71 Iowa, 162; Moore *v.* Dodd, 1 A. K. Marsh. 140; Pierce *v.* Faunce, 47 Me. 507; Hill *v.* McNichol, 76 Me. 314; Boynton *v.* Rees, 8 Pick. 329; Godfroy *v.* Disbrow, Walk. (Mich.) 260; Shotwell *v.* Harrison, 22 Mich. 410; Lusk *v.* McNamer, 24 Miss. 58; Price *v.* Martin, 46 Miss. 489; Harrington *v.* Allen, 48 Miss. 492; Halsa *v.* Halsa, 8 Mo. 308; Leman *v.* Poupenez, 35 Mo. 91; Funkhouser *v.* Lay, 78 Mo. 458; Anderson *v.* McPike, 86 Mo. 293; Craig *v.* Zimmerman, 87 Mo. 473; Martin *v.* Nixon, 92 Mo. 26; Snowden *v.* Tyler, 21 Neb. 199; Bell *v.* Twilight, 18 N. H. 159; Rutgers *v.* Kingsland, 3 Halst. Ch. 178, 658; Holmes *v.* Stout, 3 Green, Ch. 492; 2 Stock. 419, s. c.; Roll *v.* Rea, 50 N. J. 264; Bumpus *v.* Platner, 1 Johns. Ch. 213; Jackson *v.* McChesney, 7 Cow. 360; Griffith *v.* Griffith, 9 Paige, 315; Webster *v.* Van Steenbergh, 46 Barb. 211; Wood *v.* Chapin, 13 N. Y. 509; Taylor *v.* Kelly, 3 Jones, Eq. 240; Card *v.* Patterson, 5 Ohio St. 319; Bracken *v.* Miller, 4 Watts & S. 102; Filby *v.* Miller, 25 Pa. 264; Church *v.* Ruland, 64 Pa. 432 (*semble*); Ashton's App., 73 Pa. 153; City Council *v.* Paige, Speers. Eq. 159; Lacy *v.* Wilson, 4 Munf. 313; Curtis *v.* Lunn, 6 Munf. 42; Montgomery *v.* Rose, 1 Pat. & H. 5; Pringle *v.* Dunn, 37 Wis. 449. See to the same effect Chalmers *v.* Lanion, 1 Ames, Cases on Bills and Notes, 691, and n. 3.

But one who, in violation of his duty to the *cestui que trust*, has sold the trust property cannot, by reacquiring the property from a purchaser for value without notice, succeed to the latter's rights. Bovy *v.* Smith, 2 Ch. Ca. 124, 126; 1 Vern. 60, s. c.; Kennedy *v.* Daly, 1 Sch. & Lef. 379; *Re* Stapleford Co., 14 Ch. D. 432, 445 (*semble*); Huling *v.* Abbott, 86 Cal. 423; Johnson *v.* Gibson, 116 Ill. 294; Trentman *v.* Eldridge, 98 Ind. 525, 528; Bailey *v.* Binney, 61 Me. 361; Frost *v.* Frost, 63 Me. 399; Allison *v.* Hagan, 12 Nev. 38; Brophy Co. *v.* Brophy Co., 15 Nev. 101; Schutt *v.* Large, 6 Barb. 373; Clark *v.* McNeal, 114 N. Y. 287; Church *v.* Ruland, 64 Pa. 432; Armstrong *v.* Campbell, 3 Yerg. 201; Troy Bank *v.* Wilcox, 24 Wis. 671; Ely *v.* Wilcox, 26 Wis. 91; 1 Ames, Cases on Bills and Notes, 691, 692, n. 3.

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But an innocent grantee of a fraudulent grantor is guilty of no wrong in parting with the property if he is still ignorant of the equity of the defrauded person. Bonesteel *v.* Bonesteel, 30 Wis. 516. He is bound, it is true, to account to the defrauded person for so much as, but no more than, he has received (Robes *v.* Bent, Moo. 552), in exchange for the property. But, on the other hand, if he reacquires the property from an innocent purchaser for value, he may keep it. Mast *v.* Henry, 65 Iowa, 193.

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No Payment of Purchase-Money before Notice. — A purchaser of the legal title is not protected from a prior equity if he receives notice of it at any time before payment of the purchase-money. Jones *v.* Stanley, 2 Eq. Ab. 685, pl. 9; Tourville *v.* Naish, 3 P. Wms. 307; Harrison *v.* Southcote, 1 Atk. 538; Fitzgerald *v.* Bent, 2 Atk. 397; Story *v.* Windsor, 2 Atk. 630; Hardringham *v.* Nicholls, 3 Atk. 304; Maundrell *v.* Maundrell, 10 Ves. 246, 271; Taylor *v.* Baker, 5 Price, 306; Tildesley *v.* Lodge, 3 Sm. & G. 543; Molony *v.* Kernan, 2 Dr. & W. 31; Wormley *v.* Wormley, 8 Wheat. 449; Villa *v.* Rodriguez, 12 Wall. 323, 338; Wood *v.* Mann, 1 Sumn. 506; Dufphey *v.* Frenaye, 5 St. & Port. 215; Wells *v.* Morrow, 38 Ala. 125; Buford *v.* McCormick, 57 Ala. 428; Duncan *v.* Johnson, 13 Ark. 190; Eversdon *v.* Maydew, 65 Cal. 163 (*semble*); Brown *v.* Welch, 18 Ill. 343; Keys *v.* Test, 33 Ill. 316; Baldwin *v.* Sager, 70 Ill. 503; Roseman *v.* Miller, 84 Ill. 297; Slattery *v.* Rafferty, 93 Ill. 277, Burgett *v.* Paxton, 99 Ill. 288; Gallion *v.* McCaslin, 1 Blackf. 91; Parkinson *v.* Hanna, 7 Blackf. 400; Anderson *v.* Hubble, 93 Ind. 570 (*semble*); Norton *v.* Williams, 9 Iowa, 528, 532; Kitteridge *v.* Chapman, 36 Iowa, 348; Dodson *v.* Cooper, 37 Kas. 346; Moxley *v.* Haskin, 39 Kas. 653; Simms *v.* Richardson, 2 Litt. 274; Nantz *v.* McPherson, 7 Mon. 597; Hardin *v.* Harrington, 11 Bush, 367; Thomas *v.* Graham, Walk.

Ch. 117; Warner *v.* Whittaker, 6 Mich. 133; Blanchard *v.* Tyler, 12 Mich. 339; Palmer *v.* Williams, 24 Mich. 328; Kohl *v.* Lynn, 34 Mich. 360; Minor *v.* Willoughby, 3 Minn. 225; Marsh *v.* Armstrong, 20 Minn. 81; Servis *v.* Beatty, 32 Miss. 52; Kilcrease *v.* Lum, 36 Miss. 569; Halsa *v.* Halsa, 8 Mo. 308; Digby *v.* Jones, 67 Mo. 104; Arnholt *v.* Hartwig, 73 Mo. 485; Young *v.* Kellar, 94 Mo. 581; Clark *v.* Waldron, 39 Mo. Ap. 21; Patten *v.* Moore, 32 N. H. 382; Baldwin *v.* Johnson, Saxt. 441; Losey *v.* Simpson, 3 Stockt. 246; Campbell *v.* Campbell, 3 Stockt. 268; Haughwout *v.* Murphy, 21 N. J. Eq. 118; Dean *v.* Anderson, 34 N. J. Eq. 496; Keyser *v.* Angle, 40 N. J. Eq. 481 (*semble*); Frost *v.* Beekman, 1 Johns. Ch. 288; Murray *v.* Finster, 2 Johns. Ch. 155; Jewett *v.* Palmer, 7 Johns. Ch. 65; Farmers' Co. *v.* Maltby, 8 Paige, 361; Warner *v.* Winslow, 1 Sandf. Ch. 430; Christie *v.* Bishop, 1 Barb. Ch. 105; Harris *v.* Norton, 16 Barb. 264; Pickett *v.* Barron, 29 Barb. 505; Penfield *v.* Dunbar, 64 Barb. 239; Spicer *v.* Waters, 65 Barb. 227; Genet *v.* Davenport, 66 Barb. 412; Howlett *v.* Thompson, 1 Ired. Eq. 369; Richards *v.* Snyder, 11 Oreg. 501 (*semble*); Wood *v.* Rayburn, 18 Oreg. 3; Youst *v.* Martin, 3 S. & R. 423; Union Co. *v.* Young, 1 Whart. 410; Beck *v.* Uhrich, 13 Pa. 639; Juvenal *v.* Jackson, 14 Pa. 519; Snelgrove *v.* Snelgrove, 4 Dess. 274, 287; McBee *v.* Loftis, 1 Strob. Eq. 90; Bush *v.* Bush, 3 Strob. Eq. 131; Pillow *v.* Shannon, 3 Yerg. 508; Beaty *v.* Whitaker, 23 Texas, 526; Fraim *v.* Frederick, 32 Texas, 294; Hutchins *v.* Chapman, 37 Texas, 612; Morton *v.* Lowell, 56 By. 693; Abell *v.* Howe, 43 Vt. 403; Doswell *v.* Buchanan, 3 Leigh, 365; Rorer Co. *v.* Trout, 83 Va. 397; Everts *v.* Agnes, 4 Wis. 343.

But see, *contra*, Parker *v.* Crittenden, 37 Conn. 148. ; 63 Conn. 142 – reversed.

PARTIAL PAYMENT BEFORE NOTICE. — A purchaser of the legal title who has been notified of a trust or other equity to which it was subject, after a partial payment cannot be compelled to surrender the legal title except upon receiving reimbursement for what he has paid before notice. Florence Co. *v.* Zeigler, 58 Ala. 221; Craft *v.* Russell, 67 Ala. 9; Marchbanks *v.* Banks, 44 Ark. 48; Baldwin *v.* Sager, 70 Ill. 503, 507; Lewis *v.* Phillips, 17 Ind. 108 (*semble*); Rhodes *v.* Green, 36 Ind. 7; Burton *v.* Reagan, 75 Ind. 77 (but see Dugan *v.* Vattier, 3 Blatchf. 245); Kitteridge *v.* Chapman, 36 Iowa, 348; Bush *v.* Collins, 35 Kas. 535; De Ford *v.* Orvis, 42 Kas. 302; Crockett *v.* Phinney, 33 Minn. 157 (*semble*); Servis *v.* Beatty, 32 Miss. 52 (*semble*); Paul *v.* Fulton, 25 Mo. 156, 163; Digby *v.* Jones, 67 Mo. 104 (*semble*); Dougherty *v.* Cooper, 77 Mo. 528; Haughwout *v.* Murphy, 22 N. J. Eq., 531 (*semble*); Sargent *v.* Eureka Co., 46 Hun, 19 (compare Warren *v.* Wilder, 114 N. Y. 209); Youst *v.* Martin, 3 S. & R. 423 (*semble*); Union Co. *v.* Young, 1 Whart. 410 (*semble*); Juvenal *v.* Jackson, 14 Pa. 519 (*semble*); Beck *v.* Uhrich, 13 Pa. 636, 16 Pa. 499; Everts *v.* Agnes, 4 Wis. 343 (*semble*). See also, where the prior equity was a lien, Tourville *v.* Naish, 3 P. Wms. 307; Rayne *v.* Baker, 1 Giff. 241; Baldwin *v.* Sayer, 70 Ill. 503; Farmers' Co. *v.* Maltby, 8 Paige, 361; Mitchell *v.* Dawson, 23 W. Va. 86.

But see *contra*, Wormley *v.* Wormley, 8 Wheat. 421, 456; Doswell *v.* Buchanan, 3 Leigh, 365.

There is authority, indeed, for the position that a purchaser under such circumstances may retain the property purchased subject to a lien for the amount of the unpaid purchase money in favor of the equitable incumbrancer. Flagg *v.* Mann, 2 Sumn. 566 (see also Wood *v.* Mann, 1 Sumn. 506); Dowell *v.* Applegate, 7 Fed. Rep. 881; Florence Co. *v.* Zeigler, 58 Ala. 221, 244; Green *v.* Green, 41 Kas. 472; Hardin *v.* Harrington, 11 Bush, 367; Haughwout *v.* Murphy, 21 N. J. Eq. 118. See also, *Ex parte* Golding, 13 Ch. Div. 628; Kemp *v.* Falk, 7 App. Cas. 573, 14 Ch. Div. 446.

NOTICE BEFORE CONVEYANCE OF THE LEGAL TITLE. — A purchaser is not protected from a prior equity if he receives notice of it at any time before the conveyance is executed, even though he may have paid the purchase-money before notice. Wigg *v.* Wigg, 1 Atk. 384; Mackreth *v.* Symmons, 15 Ves. 335; Whitworth *v.* Gangain, 3 Hare, 416, 428; Boone *v.* Chiles, 10 Pet 177, 212 (*semble*); Moore *v.* Clay, 7 Ala. 742 (*semble*); Fash *v.* Ravesies, 32 Ala. 451; Wells *v.* Morrow, 38 Ala. 125, 128; Louisville Co. *v.* Boykin, 76 Ala. 560; Duncan *v.* Johnson, 13 Ark. 190, 192; Gallion *v.* McCaslin, 1 Blackf. 91; Dugan *v.* Vattier, 3 Blackf. 246, 247; Lewis *v.* Phillips, 17 Ind. 108 (*semble*); Rhodes *v.* Green, 36 Ind. 7 (*semble*); Simms *v.* Richardson, 2 Litt.

274; Nantz *v.* McPherson, 7 Mon. 597, 599; Currens *v.* Hart, Hardin, 37; Corn *v.* Sims, 3 Met. (Ky.) 391; Wing *v.* McDowell, Walk. Ch. 175, 183; Kilcrease *v.* Lum, 36 Miss. 569 (*semble*); Phillips *v.* Morrison, 24 N. J. Eq. 195; Dean *v.* Anderson, 34 N. J. Eq. 496 (*semble*); Frost *v.* Beekman, 1 Johns. Ch. 288, 301 (*semble*); Grimstone *v.* Carter, 3 Paige, 421, 436; Peabody *v.* Fenton, 3 Barb. Ch. 451, 464–5; Anketel *v.* Converse, 17 Ohio St. 11 (*semble*); Bush *v.* Bush, 3 Strob. Eq. 131 (*semble*); Pillow *v.* Shannon, 3 Yerg. 508 (*semble*); Blair *v.* Owles, 1 Munf. 38 (*semble*); Hoover *v.* Donally, 3 Hen. & M. 316; Mutual Society *v.* Stone, 3 Leigh, 218 (*semble*).

But see *contra*, Wheaton *v.* Dyer, 15 Conn. 307, 311 (*semble*); Paul *v.* Fulton, 25 Mo. 156, 163 (*semble*); Gibler *v.* Trimble, 14 Ohio, 323; Youst *v.* Martin, 3 S. & R. 423.

Similarly, if a bill negotiable only by indorsement is transferred by delivery merely to a purchaser for value without notice, but is not indorsed to him until after he has been notified of an equity attaching to the bill, the indorsee will acquire only the rights of his transferor. Esdaile *v.* Lanauze, 1 Y. & C. 394; Whistler *v.* Forster, 14 C. B. N. S. 248; Savage *v.* King, 17 Me. 301; Haskell *v.* Mitchell, 53 Me. 468; Allum *v.* Perry, 68 Me. 232; Lancaster Bank *v.* Taylor, 100 Mass. 18; Gibson *v.* Miller, 29 Mich. 355 (*semble*); Dowell *v.* Brown, 21 Miss. 43; Southard *v.* Porter, 43 N. H. 379; Clark *v.* Whitaker, 50 N. H. 474; Gilbert *v.* Sharp, 2 Lans. 412; Goshen Bank *v.* Bingham, 118 N. Y. 349; Beard *v.* Dedolph, 29 Wis. 136 (*semble*).

See *contra*, Baggarly *v.* Gaither, 2 Jones, Eq. (N. C.) 80. — ED.

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SAUNDERS *v.* DEHEW.

IN CHANCERY, BEFORE SIR JOHN TREVOR, SIR WILLIAM RAWLINSON, AND SIR GEORGE HUTCHINS, COMMISSIONERS, JUNE 3, 1692.

[*Reported in* 2 *Vernon*, 271.[1]]

ANNE BAYLY, being possessed of a term for years, makes a voluntary settlement thereof, in trust for herself for life, remainder to her daughter Isabella Barnes for life, remainder to the children of Isabella, by Mr. Barnes, her then husband. Isabella, for £200, mortgages the lands in question to the plaintiff, who pretends he had no notice of the settlement; Isabella, in the mortgage deed, being called the daughter and heir of John Bayley. The plaintiff hearing of it gets an assignment of the term from the trustees.

Per Cur. Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust. And the plaintiff's bill being brought against the children of Isabella to foreclose them, the court refused so to do, saying, if he might be suffered to protect himself, by thus getting in the legal estate, they would not carry it on by a decree in equity to foreclose.[2]

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[1] Freem. C. C. 123, S. C. — ED.

[2] Allen *v.* Knight, 5 Hare, 272; 11 Jur. 257, S. C., on appeal; Carter *v.* Carter, 3 K. & J. 617 (*semble*); Prosser *v.* Rice, 28 Beav. 68, 74 (*semble*); Sharples *v.* Adams, 32

Beav. 213, 216 (*semble*); Baillie *v.* McKewan, 35 Beav. 177; Pilcher *v.* Rawlins, L. R. 7 Ch. Ap. 259 (*semble*); Mumford *v.* Stohwasser, L. R. 18 Eq. 556 *Accord.*

Campbell *v.* Brackenridge, 8 Blackf. 471; Carroll *v.* Johnston, 2 Jones (N. C.) Eq. 120, *contra.*

In Carter *v.* Carter, *supra*, Sir W. Page Wood, V. C., said, p. 639: "Sir John Leach laid it down (and I apprehend that he did not exceed the authorities referred to in that case when he so laid it down) that a purchaser from a person in possession purchasing without notice of any prior charge or trust, and obtaining a conveyance of the legal estate from the trustee of a satisfied term or the mortgagee of a satisfied mortgage, will always be protected in this court against a prior incumbrancer or *cestui que trust*, subject only to one observation which has considerable bearing on the case before me, — an observation to be found in Lord Eldon's remarks in Maundrell *v.* Maundrell, 10 Ves. 246, and repeated by him in *Ex parte* Knott, 11 Ves. 609, and several other cases, — which is this, that the party so conveying the legal estate must not have notice of an express prior trust or incumbrance. On looking through the authorities, you find that, where a conveyance is to be obtained from a mortgagee who has become a constructive trustee by the mortgage being satisfied, or from a trustee of a term to attend on the inheritance, the question who is or is not entitled to the equity of redemption or to the inheritance may be a question that may affect him as to the conveyance he may make; but, at the same time, there is no direct notice afforded by the document in the hands of the trustee or mortgagee of any ulterior trust beyond this, that he is to hold for the persons entitled. In Maundrell *v.* Maundrell, and again in *Ex parte* Knott, Lord Eldon discusses the whole doctrine, to which, he says, he has considerable aversion, and searches with great jealousy into the cases; and he says he has not been able to find a case where a person being a mortgagee without notice of a previous incumbrance has been held to be entitled to obtain from the trustee of an outstanding legal estate the conveyance of that estate, when the trustee himself had notice of the intervening incumbrance. And I must say, having now examined a great number of authorities, I have not been able to find a case of that description. I speak of cases where it is a dry trust — not the case of a mortgagee whose mortgage is unsatisfied, but the dry trust of a satisfied mortgage or a satisfied term of years attending on the inheritance, where there is nothing but the trust remaining to be performed. There are several cases where the purchaser has been allowed at the last moment, after payment in full and up to decree, to get in an earlier mortgage; and there is no breach of duty in a person assigning his mortgage to anybody who pays him. Any purchaser is entitled to hold that which, without breach of duty, has been conveyed to him. But the case put by Lord Eldon is this: Could the purchaser insist on any benefit to be derived from that which would be a breach of duty or breach of trust in the trustee? In *Ex parte* Knott he says, 'Surely, if the purchaser would be safe,' — if the purchaser would be entitled to hold the estate discharged of the trust, — 'the trustee ought to be so.' The trustee should be protected in the act which he has committed. 11 Ves. 614. Whether that doctrine will ultimately be held, it is not perhaps important for me, at present, to say; but I must say, on looking through a vast number of volumes of the earlier and later authorities, I have not found any such case as Lord Eldon has put, — I have not found any case in which a purchaser, obtaining a conveyance of a mere dry trust estate from a trustee of a satisfied term, or from a mortgagee whose mortgage has been satisfied, such trustee or mortgagee having at the time when he made the conveyance notice of an intervening charge or trust, has been held entitled to protect himself from such charge or trust by means of the legal estate which he has so obtained."

In Pilcher *v.* Rawlins, *supra*, Sir W. M. James, L. J., said, p. 268: "I do not mean in the few observations which I am about to make, to refer to a class of cases which appear to me entirely distinct in principle from the case now before us. I mean that class of cases in which a person finding himself in possession under a defective title has cast about to cure that defect by procuring some one else to convey an outstanding legal estate. No doubt it has been held in this court that a man under those circumstances may get in a mortgage and tack his defective title to the estate of that mortgagee. He has also been allowed to get in an outstanding legal estate from a person who, being a trustee for the real owner, is not a trustee for the person seeking the conveyance But those cases where the person seeking the conveyance knew the fact that the trustee was trustee for somebody else, and could not convey without a breach of trust, whilst the trustee was left in ignorance, — those cases, I say, involve a principle which I have never been able to understand."

In Mumford *v.* Stohwasser, *supra*, Sir G Jessel, M. R., said, p. 562: "There is a second point raised on which I have a word to say, although I think it does not arise in this case. I mean the question, what the effect would be if the defendant had no notice of the trust. I say I do not think it is necessary to decide it, because I hold that he had notice. As to this second point, there has been a great conflict of opinion; my own opinion is, that even without notice he could not have acquired title; but, as I said before, there is probably no point on which there has been greater difference of opinion. I entirely subscribe to what Lord Justice James said, in the case of Pilcher *v.* Rawlins, Law Rep. 7 Ch. 259, as to the old cases, in which a trustee of a term to attend the inheritance was allowed to assign in such a manner as to give preference, being contrary to all principle. Those were really cases of constructive notice, because the person taking the assignment must have known that the person assigning was a trustee for some one. What Lord Justice James says is this, Law Rep. 7 Ch. 268: 'Those cases where the person seeking the conveyance knew the fact that the trustee was trustee for somebody else, and could not convey without a breach of trust, whilst the trustee was left in ignorance, — those cases, I say, involve a principle which I have never been able to understand.' The case on which I have just expressed my opinion is the converse one to that put by the Lord Justice. I do not mean the actual case now before me, because I hold that the mortgagee had notice; but supposing that I did not so hold, this would be the case of a trustee knowing that he was a trustee assigning over the legal estate to a person who did not know he was a trustee, that person having previously acquired an equitable interest; and I should hold, if that neat point came for decision, which I think it does not in this case, that the second equitable incumbrancer or the purchaser of the equity did not thereby gain any priority; in other words, that a person knowing that he is a trustee cannot, without receiving value at the time, by committing a breach of trust, deprive his own *cestui que trust* of his rights. Here, however, the point I have to decide is whether a person with notice at the time he takes the legal estate that the person assigning it is a trustee of the estate can get priority. I think that has been long since settled."

See to the same effect, Maxfield *v.* Burton, L. R. 17 Eq. 15, 19; Harpham *v.* Shacklock, 19 Ch. Div. 207. Compare Garnham *v.* Skipper, 34 W. R. 136, per North, J.

If the holder of the legal title transfers it to the second equitable claimant, who is still ignorant of the prior equity, when he ought to convey to the first equitable claimant, the actual transferee, having got the title, may keep it. Thorndike *v.* Hunt, 3 De G. & J. 563; Cooke *v.* Wilton, 29 Beav. 100; Ratcliffe *v.* Barnard, 6 Ch. 652; Leask *v.* Scott, 2 Q. B. Div. 376 (dissenting from Roger *v.* Comptoir D'Escompte, L. R. 2 P. C. 393); London Co. *v.* London Bank, 21 Q. B. Div. 535; Taylor *v.* Blacklock, 32 Ch. D. 560; Colonial Bank *v.* Hepworth, 36 Ch. D. 36; Miller *v.* Boykin, 70 Ala. 469; People *v.* Swift (Cal., 1892) 31 Pac. R. 16; Gibson *v.* Lenhart, 101 Pa. 522. See also 1 Harvard Law Rev. 15-16; 4 Harvard Law Rev. 309, n. 3.

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But see *contra*, Sharples *v.* Adams, 32 Beav. 213, 216; Mumford *v.* Stohwasser, *supra*; Maxfield *v.* Burton, 17 Eq. 15, 17, per Jessel, M. R.; Garnham *v.* Skipper, 34 W. R. 136, per North, J.; Barnard *v.* Campbell, 55 N. Y. 456, 58 N. Y. 73 (overruling Fenby *v.* Pritchard, 2 Sandf. 151); Muller *v.* Pondir, 55 N. Y. 325 (*semble*). — ED.

BATES *v.* JOHNSON.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., APRIL 20, 27; MAY 30, 1859.

[*Reported in Johnson*, 304.]

VICE-CHANCELLOR SIR W. PAGE WOOD.[1] The facts upon which the question in this case arises may be very shortly stated. In 1823, previously to his marriage, Thomas Ellis Bates, the father of the plaintiffs, made a settlement, by which he agreed to convey certain real property, of which he was seised in fee-simple, to trustees, upon trust for his then intended wife, during her life, for her separate use, with remainder for the survivor of them for life, with remainder for their children. He afterwards suppressed that settlement, and in fraud of it made three successive mortgages of the property, — the first to one Brooke, since deceased, the second to the defendant Nash, and the third to the defendant Hooke, all of which are now vested in Hooke. And the short question is, whether, each mortgagee having advanced his money without notice of the settlement, the third, who has got in the legal estate since the institution of the suit, can insist upon that legal estate against the plaintiffs, who had filed their bill to redeem the first mortgage.

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The plaintiffs admit, that, as against the first mortgagee, they are unable to establish any priority, he having advanced his money and taken his security without notice of their equity; but they insist, that, upon redeeming him, they will be entitled to the estate discharged of the subsequent mortgages, notwithstanding the legal estate has been got in by the third mortgagee in the manner I have described.

The plaintiffs, of course, admit the long-established doctrine, that, where there are three successive mortgagees, the third taking his security without notice of the second at the time of advancing his money, if the third can obtain, even after bill filed, a conveyance of the legal estate from the first, he can, as it is termed, "squeeze out" the second, although at the time of obtaining such conveyance he had full notice of the existence of the second mortgage. The fact of his having such notice at the time of his getting in the legal estate is immaterial, provided he had no such notice at the time when he advanced his money. Whether the principle is satisfactory or not is not the point, but it is now settled beyond dispute upon the authorities; and the result is (although I am not aware that such a case has actually occurred), that, if a second and a third mortgagee are both equally desirous of redeeming the first, the first mortgagee has it in his power, if he be so minded, to give the preference to which of the two he pleases,

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[1] See *supra*, p. 70, n. 1. — ED.

— a result contrary to the ordinary doctrine of the court. In every case, down to Peacock *v.* Burt, which is probably one of the most striking of the kind, it has been held, that, when once a subsequent incumbrancer, who, by advancing his money, without notice of prior mesne incumbrances, stands in an equally good position with them in every respect, except as regards time, gets in the legal estate, he has a right to avail himself of that legal estate until the whole of his incumbrance is discharged.

Peacock *v.* Burt was a very strong case, for this reason: There the first mortgagee had notice of the second mortgage as soon as it was made; and, with that notice before him, he made further advances to the mortgagor, and subsequently joined with the mortgagor in executing a transfer, and further charge on the estate, in favor of a third mortgagee, without informing him of the intervening incumbrance, of which notice had been given him for the very purpose of protecting it from being so defeated: yet it was held, that the third mortgagee, who had thus obtained the legal estate, was entitled to hold it discharged from the intervening incumbrance.[1]

But the plaintiffs rely on the covenant on the part of the settlor, that, until the hereditaments and premises shall have been conveyed and assured pursuant to his covenant, all and every the hereditaments and premises, and the rents and profits thereof, shall be held, paid, applied, and disposed of upon the trust mentioned in the indenture of settlement. This, they say, was a covenant running with the land, and would bind the first mortgagee when once he had notice. It was suggested, that possibly it might bind him even without notice as a covenant running with the land, so as to give a right of action at law; but, at all events, it was argued, that it would bind him after he had received notice of the settlement, and would be equivalent, in fact, to a declaration of trust, and ought to have the same effect as a declaration of trust inserted in his mortgage, and binding him, after satisfying his own debt, to hold the property upon the trusts of the settlement; and his conscience being distinctly and clearly affected by the trusts of the settlement, it was a breach of trust, as the plaintiffs insisted, in him to convey the property to a subsequent mortgagee, instead of conveying it upon the trusts by which he himself was affected.

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[1] Peacock *v.* Burt, 4 L. J. N. S. Ch. 33, seems to have been misunderstood. The questionable doctrine of tacking was not involved. A. made a first mortgage to X. for £8,700; he then made a second mortgage to Y. for £2,000, of which X. was informed. Finally Z. advanced £12,000, paying £8,700 to X. and taking an assignment from him, and paying the balance to A. Z. had no notice of Y.'s mortgage. Y.'s claim was postponed to Z.'s. The strongest opponents of the English doctrine of tacking cannot properly doubt the soundness of Peacock *v.* Burt. Z. advanced his money in good faith on the strength of the legal title at that time conveyed to him. His rights were the same as they would have been if X. had reconveyed to A.; and A., having regained the legal estate, had conveyed to Z. to secure the £12,000. Such was the case in Carlisle Co. *v.* Thompson, 28 Ch. D. 398; West London Bank *v.* Reli-

After carefully reconsidering the authorities which I had occasion to refer to in Carter *v.* Carter,[1] I do not see that there can be any doubt whatever as to the doctrine established by the authorities. The authorities, as it seems to me, have gone to this extent (although I am still of opinion that they have never gone further), that any person having an unsatisfied mortgage or charge upon real property is at liberty, at any time before decree, to convey the legal estate in the property, in respect of his unsatisfied charge, to any subsequent incumbrancer, who may have advanced his money without notice of any intervening or other charge or incumbrance, and by so doing may give to that other incumbrancer a right, which this court cannot take from him, to insist upon the legal estate, which, as the court holds, he has thus properly acquired.

In the case of a satisfied mortgage, where the mortgagee would hold simply upon trust for the original mortgagor or those claiming under him, or in the case of a trustee of a satisfied term, — which are the cases put by Lord Eldon in Maundrell *v.* Maundrell[2] and *Ex parte* Knott,[3] — I do not find any authority which decides, that, where notice has once been fixed upon the person thus holding as a trustee of a dry legal estate for the benefit of the parties entitled, he is at liberty to convey that estate to a third party, or to give to such third party a security which could only be acquired through the medium of a breach of trust on his part. It is true, that I do not find any authority which expressly determines the contrary: Saunders *v.* Dehew, and Allen *v.* Knight,[4] which came first before V.-C. Wigram, and afterwards before Lord Cottenham, have determined, that, where there is an express declaration of trust, the trustee cannot convey the property otherwise than in the condition in which he holds it, namely, fettered with the trusts declared by the deed. But those were cases of express trust, and therefore distinguishable. Upon looking through all the authorities, I adhere to the observations which I made in Carter *v.* Carter.[1] I have not been able to find any case such as Lord Eldon has put, and in which it has been held that a purchaser obtaining a conveyance of a mere dry trust estate, whether from a trustee of a satisfied term or from a mortgagee whose mortgage has been satisfied, such trustee or mortgagee having, at the time of making the conveyance, notice of an intervening charge or trust, the purchaser is entitled to protect himself from such charge or trust by means of the legal estate which he has so obtained. And it appears to me that the observation of Lord Eldon is very strong, that if the purchaser can so protect himself, then the trustee ought to be indemnified in respect of his having made the conveyance.[5] In other words, you can hardly say that the estate is acquired by a

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ance Society, 29 Ch. Div. 954. See further Fourth Society *v.* Williams, 14 C. D. 140; Hosking *v.* Smith, 13 App. Cas. 582. — Ed.

[1] 3 K. & J. 617, 640.

[2] 10 Ves. 246.

[3] 11 Ves. 614.

[4] 5 Hare, 272; s. c. on appeal, 16 L. J. n. s. Ch. 370.

[5] See per Lord Eldon in *Ex parte* Knott, 11 Ves. 614.

conveyance which is a breach of trust on the part of the person making it, and known to be so by him at the time that he is making the conveyance.

In applying the law to the facts of the case before me, all I find is this: I find a first mortgagee, who advances his money, and takes his security, without any notice whatever of the trust. Whether he is affected by the covenant running with the land is a question, which, if it be necessary to determine it at all, must be determined by a court of law. He takes his security without any notice whatever, either upon the face of his mortgage deed or otherwise, of any trust. There is no engagement upon his part to perform any trust. It is not like the case put in argument, on behalf of the plaintiffs, of a declaration of trust of a satisfied term, where the party obtaining such a declaration of trust is held to be in the same position as if he had obtained an actual assignment of it, the declaration of trust being equivalent to an actual assignment, and, therefore, preventing the trustee from afterwards parting with the legal estate for the benefit of himself, and to the detriment of those for whom he has declared himself to be a trustee. Here the first mortgagee takes the legal estate without making any declaration of trust, — he never hears of the existence of any trust affecting the mortgaged property until after his money has been advanced; and in that state of circumstances a first mortgagee is, I apprehend, in the same position as any other unsatisfied mortgagee having notice of a subsequent incumbrance, and has a right to transfer the legal estate so vested in him to any person who will pay off his debt. He is not to be fettered or incumbered by any considerations arising out of a trust which he has never undertaken, and of which he is never informed until after he has parted with his money. Having the legal estate in his hands, he is justified in transferring it as he took it from the original mortgagor, and subject only to the equity of redemption limited by his mortgage deed, and may transfer it to the second or to the third incumbrancer, as he may see fit.

That being the position of the first mortgagee, what is the position of the subsequent mortgagee, who, having, like the first, advanced his money without notice of any prior trust, obtains from the first that legal estate which the first may thus lawfully convey? The two positions seem to me correlative. If the holder of the legal estate can thus lawfully convey it, the party to whom he so conveys it can lawfully avail himself of it for the purpose of repaying to himself every advance which he may have made upon the security of the property, without notice of the rights of any other person in priority to his own. To that he is entitled, according to the authorities, at any period after bill filed, as well as before, until a decree is made in the suit. And I cannot in substance distinguish the case before me from the class of cases ending with that of Peacock *v.* Burt.

The question as to the policy of assurance appears to me to be involved in the former. If I had held that the plaintiffs, upon discharging the first mortgage, would be entitled to redeem, and to hold the estate free from the subsequent charges; the consequent right would have followed, and they would have been entitled to hold all the other property included in the mortgage to the first mortgagee for the purpose of recouping to themselves whatever they might so have paid in discharging the first mortgage. In other words, upon payment of the mortgage debt they would have been entitled to all the securities. The second question, therefore, in substance, resolves itself into the first.

As regards the first, it appears to me, upon a review of the whole class of authorities, that there is nothing to justify me in holding that the first mortgagee could not lawfully part with his legal estate so long as his debt remained unpaid. And he having parted with it, I find nothing in the authorities to authorize me in saying that I am to take the legal estate away from the holder of it until the whole of his debt has been satisfied.[1]

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[1] The doctrine of "tacking," as established in the case of Marsh *v.* Lee, 1 Ch. Ca. 162; Hard. 173; 2 Vent. 337, s. c., although frequently recognized by the English courts, — Bovey *v.* Skipwith, 1 Ch. Ca. 201; Anon., 2 Ch. Ca. 35; Anon., 2 Ch. Ca. 208; Windham *v.* Atkins, 2 Ch. Ca. 212; Cockes *v.* Sherman, Freem. C. C. 13; Hawkins *v.* Taylor, 2 Vern. 29; Brace *v.* Marlborough, 2 P. Wms. 491 (*semble*); Morret *v.* Paske, 2 Atk. 52 (*semble*); Matthews *v.* Cartwright, 2 Atk. 347; Wortley *v.* Birkhead, 2 Ves. 571; 3 Atk. 809, s. c.; Titley *v.* Davies, 2 Y. & C. C. C. 403; Belchier *v.* Butler, 1 Eden, 523; 5 Bro. P. C. (Toml. ed.) 292; Robinson *v.* Davison, 1 Bro. C. C. 63; Peacock *v.* Burt, 4 L. J. N. S. Ch. 33 (*semble*); Rooper *v.* Harrison, 2 K. & J. 86 (*semble*); Spencer *v.* Pearson, 24 Beav. 266; Atherley *v.* Barnett, 52 L. T. Rep. 736; Ledbrook *v.* Passman, 57 L. J. Ch. 855; Taylor *v.* Russell, '92, A. C. 244, '91, 1 Ch. 8 (but see Anon., Freem. 331), — is to be regarded as anomalous. Lord Blackburn said, in Jennings *v.* Jordan, 6 App. Cas. 714: "Some of the rules acted on in courts of equity in the kindred subject of tacking securities on the same property are founded upon this, that a mortgage, after the time specified for redemption had expired, was an absolute estate, which no doubt it was at law; and that the equity of redemption was only a personal equity to take away the legal estate from him in whom it was vested, which perhaps it originally was. It would seem that now, after equitable estates have been treated and dealt with for a very long time as, to all other intents, estates, any rules founded on the antiquated law ought to be no longer applicable, and that *cessante ratione, cessare debet et lex;* but some rules apparently founded on this antiquated law have been so uniformly and long acted upon that they must be treated as still binding. The rule was first laid down in Marsh *v.* Lee, 2 Vent. 337, that if there was a subsequent mortgagee, who, as the legal estate was in another, could only be a mortgagee of the equity of redemption, whose claim being prior in time to that of a third mortgagee would be satisfied before it, yet if the third mortgagee acquired the legal estate, even with full knowledge of the existence of the second mortgage, he should be entitled to squeeze out the second mortgage. In Brace *v.* Duchess of Marlborough, 2 P. Wms. 491, in 1728, the Master of the Rolls thought that the rule of equity was so settled, 'not, however, without great appearance of hardship; for still it seems reasonable that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know when he lent his money that the land was of sufficient value to pay the first mortgage and his own also; to be defeated of a just debt by a matter *inter alios acta*, a contrivance between the first mortgagee and the third, is great severity.' Yet notwithstanding these, as it seems to me, unanswerable objections to the rule, he considered it established. In Wortley *v.* Birkhead, 2 Ves. Sen. 571, Lord Hardwicke intimates, I think pretty plainly, that if it were then to be

DODDS *v.* HILLS.

In Chancery, before Sir W. Page Wood, V. C., March 22, 1865.

[*Reported in 2 Hemming & Miller*, 424.]

The plaintiff was a married woman (suing by next friend), upon whom certain shares in the Whittle Dean Water Company had been settled for her separate use. The shares stood in the name of Henry Hills, as sole trustee, having formerly stood (as the share certificate showed) in his name jointly with that of another person.

On the 19th of September, 1857, Hills obtained an advance from the defendant, Smith, out of the funds of a club of which Smith was secretary; as security for which he executed a transfer of the said trust shares, and handed the same, together with the certificate of the shares, to Smith. He also gave a promissory note to the treasurer of the club.

Further advances were made by Smith, partly out of the funds of the same and another club of which also Smith was secretary, and partly out of his own moneys; and it was verbally arranged between Hills and Smith that the shares should be held by Smith as security for these further sums. The security of the shares appeared to have been given to Smith personally to indemnify him, and not directly as a security to the clubs. At the time when these advances were made, Smith had no notice of the trust, or that the shares were not the absolute poperty of Hills. Hills regularly received the dividends, and paid them over to the plaintiff.

On the 7th of June, 1863, Hills absconded; and on the 30th of June a petition in bankruptcy was filed, under which he was declared bankrupt.

On the 14th of June, 1863, the plaintiff and her husband informed Smith that Hills held the shares upon trust for the plaintiff.

On the 19th of June, 1863, Smith sent the transfer, with the certifi-

settled for the first time he would have decided the other way, but that it was settled; and in Titley *v.* Davies, 2 Y. & C. C. C. 403, in 1743, he acted upon it; and now, after the lapse of nearly a century and a half more, I think only the legislature can do away with this rule." See also West London Bank *v.* Reliance Society, 29 Ch. Div. 954, 957, 961, 963; 2 Fisher, Mortgages (3d ed.), 600.

The English doctrine of "tacking" has met with no favor in this country. 1 Story, Eq. Jur. (13th ed.), §§ 413-419; 4 Kent (13th ed.) 177-179; Osborn *v.* Carr, 12 Conn. 195, 208; Gallion *v.* McCaslin, 1 Blackf. 95, n. 3; Wing *v.* McDowell, Walk. Ch. 175; Grant *v.* United States' Bank, 1 Cai. Cas. 112; Bridgen *v.* Carhartt, Hopkins, 234; Brazee *v.* Lancaster Bank, 14 Ohio, 318, 321; Henderson *v.* Neff, 11 S. & R. 208, 222; Chandler *v.* Dyer, 37 Vt. 345; Siter *v.* McClanachan, 2 Grat. 280, 300, 301. But the general prevalence of the system of registration here deprives the doctrine of all practical importance. See also La Touche *v.* Dunsany, 1 Sch. & Lef. 137, 157. — Ed.

cate, to the secretary of the company for registration, and the shares were on the following day registered in the name of Smith.

The Whittle Dean Water Company was constituted by act of Parliament, with which the Companies Clauses Consolidation Act was incorporated.

The bill prayed that the transfer of the shares might be set aside; or, in the alternative, that the plaintiff might be let in to redeem.

Mr. Willcock, Q. C., and *Mr. Torriano*, for the plaintiff.

Mr. Rendall, in the same interest.[1]

Mr. Amphlett, Q. C., and *Mr. C. C. Barber*, for the defendants, were not called upon.

VICE-CHANCELLOR SIR W. PAGE WOOD. It is impossible to give the plaintiff any relief against this transfer. It is a case of great hardship upon the plaintiff; but the defendant Smith does not appear to me to be in any way answerable for that. The shares stood in the name of Hills apparently as absolute owner; and he purported, as such owner, to transfer them to Smith by way of security. There is some obscurity in the evidence, as to whether Smith took the shares as representing the different clubs; but the real effect of the evidence is, I think, that the security was given personally to Smith himself, which somewhat simplifies the case. After the transfer was given to Smith, Hills continued to receive the dividends; and the arrangement seems to have been this: Smith, being responsible to his societies for the money, required Hills to give him, by way of indemnity, such a power over the shares as would enable him, Smith, whenever he pleased, to make himself legal owner. That Hills did, by executing a transfer, and Smith allowed him to remain on the register and receive the dividends as long as he made no default in respect of the advances, being content as mortgagee with the power given to him of registering the transfer. When this arrangement was made, Smith had no notice of the trust; and, after having received notice, he registered the transfer. At the time of the transfer he acquired the power to register himself as owner of the shares. Hills could not displace the equity thus acquired, nor was anything further necessary to be done on his part to complete the transaction. Although it is true that, as between him and the company, Smith did not become the owner until after registration, nothing but his own act was necessary to make him complete master of the shares. His position was like that of a person to whom an estate is conveyed, to become legally vested on the performance of some condition, such as the making of a demand, or the like; and in such a case, notice of a trust would not prevent the subsequent performance or effect of this condition.[2]

It was suggested that the transfer could not be completed without a breach of trust; but that is not so. After the notice, Smith did not require Hills to commit any breach of trust, or to do anything. It is the case of a person advancing money on an equitable security without notice of a trust, and afterwards getting in the legal estate, and no more involves a breach of trust than when a mere incumbrancer gets in the legal estate as *tabula in naufragio*. As to the subsequent securities, it appears to me clear that the further advances were made on the faith of having the security of the shares. There has been no attempt to shake the evidence on this point by cross-examination. Some suggestion was made that the defendant was guilty of negligence, such as to fix him from the outset with notice of the trust. But there is no evidence of any negligence. The certificate showed only that Hills and another were once joint owners of the shares. Even if the fact of money being in the hands of two persons could be considered to be any kind of evidence of a trust, it would be most dangerous (especially in a case where the money has ceased to stand in two names) to say that a purchaser is thereby put upon inquiry. There was nothing to raise a legitimate suspicion in any one's mind. Nor is there anything in the fact that the mortgagor was left in the legal possession of the shares, and in the receipt of the dividends. Such a circumstance might be material in a case of bankruptcy, but that would be only under the doctrine of reputed ownership. There was nothing unreasonable in allowing the mortgagor to hold until it became necessary to enforce the power of taking actual possession.

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[1] The argument for the plaintiff is omitted. — ED.

[2] See Hume *v* Dixon, 37 Oh St. 66; Buck *v*. Winn, 11 B. Mon. 320, 323. — ED.

78 Ga. 315

The plaintiff is of course entitled to redeem, and there will be the usual decree for account and redemption.[1]

[illegible]

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[1] Redfearn v. Ferrier, 1 Dow. 50; 5 Pat. (Scotch) Ap. Cas. 707, s. c.; Ortigosa v. Brown, 47 L. J. Ch. 168 (*semble*); Société-Générale v. Walker, 11 App. Cas. 20, 28; Roots v. Williamson, 38 Ch. D. 485 (*semble*); Moore v. Northwestern Bank, '91, 2 Ch. 599 (*semble*); Burns v. Lawrie's Trusts (Court of Session, 1840) 2 D. 1348; Brewster v. Sime, 42 Cal. 139; Thompson v. Toland, 48 Cal. 112; Winter v. Belmont, 53 Cal. 428; Atkinson v. Atkinson, 8 All. 15; Lowell, Transfer of Stock, § 99; 1 Harvard Law Rev. 5. 6 *Accord.*

Donaldson v. Gillot, L. R. 3 Eq. 274, *contra*. See also *Re* Tahiti Co., 17 Eq. 273, explained in France v. Clark, 26 Ch. Div. 257, 22 Ch. D. 830. In this last case certificates of shares with a power of attorney signed in blank were pledged, and wrongfully transferred by the pledgee to an innocent purchaser. The blanks, it was decided, operated as notice to the purchaser, that he was buying at his peril. But see now Colonial Bank v. Hepworth, 15 App. Cas. 278–9, per Lord Watson, and compare 2 Ames' Cases on Bills and Notes, 868, § 13, f. — ED.

89 Ala. 34
62 O. S. 5
27 Vic. L.
749.

THE DIRECTORS, &c. OF THE SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY, PLAINTIFFS IN ERROR, *v.* THE QUEEN, ON THE PROSECUTION OF EMMA SARAH ROBSON, DEFENDANT IN ERROR.

IN THE HOUSE OF LORDS, MARCH 5, 9, 1875.

[*Reported in Law Reports, 7 House of Lords,* 496.]

THE LORD CHANCELLOR (Lord Cairns).[1] My Lords, if it were not for the very sincere respect which I entertain for the unanimous opinion of the learned judges of the Court of Exchequer Chamber,[2] I should have thought that this case was an extremely simple one, and that if it had fallen to be decided in one of the courts of equity, to whose administration the subject-matter more properly belongs, it could hardly have admitted of any serious argument.

My Lords, the prosecutor of the *mandamus* in this case was Mrs. Robson, the widow of one Christopher Robson. She came before the Court of Queen's Bench for the purpose of obtaining a *mandamus* to order the directors of the Shropshire Union Railways and Canal Company to transfer, in their books, into her own name, a sum of £3,712 10*s.* of their consolidated stock of 1854, which was then standing in the name of George Holyoake. She came with an instrument of transfer under the seal of Holyoake executed on the 5th of May, 1869; but that instrument of transfer was not executed until after notice had been given to her of the infirmity of her previous title. It is very properly admitted on both sides that the case must be dealt with as if it had fallen to be decided before that document had been executed.

Looking at the case as it stood before that document was executed, the facts which are clearly to be borne in mind are these: George Holyoake had standing in his own name (for I disregard the history of the period during which another name was associated with his) stock of the company to the value of £3,712 10*s.* Undoubtedly he held that stock as trustee for the defendants, and in no other character. The special case states that this stock was in his name in the year 1863, from which time he has held it "as trustee in trust for the Shropshire Union Railways and Canal Company, and in no other capacity whatsoever, and thenceforth from time to time all the dividends which have become payable on the stock were invested in the names of the chairman of the company and other directors thereof, who have held the same as trustees for the company."

It was perfectly legitimate that these defendants should own the stock. It is perfectly in accordance with law that they should have had that stock, which they could not hold in their own names, standing for them in the name of a trustee or in the names of trustees, and in that state of things undoubtedly the position of matters was, that the defendants had the whole beneficial interest in the stock belonging to and forming part of the property of the company. Theirs was the equitable title. Holyoake was a person who held merely the legal title and the right to transfer the stock. He was able, if not interfered with, to transfer the stock to any other person, and to give a valid receipt for the purchase-money to any person who had not notice of the beneficial interest of the defendants. On the other hand, any person with whom Holyoake might deal by virtue of his title upon the register, had, or ought to have had, these considerations present to his mind. He ought to have known that although Holyoake's name appeared upon the register as the owner of these shares, and although Holyoake could present to him the certificates of this ownership, still it was perfectly possible either that these shares were the beneficial property of Holyoake himself, or that they were the property of some other person. If he dealt merely by equitable transfer, or equitable assignment with Holyoake,[1] and if it turned out that the beneficial ownership of Holyoake was coincident and coextensive with his legal title, well and good; his right would be accordingly, so far as Holyoake was concerned, complete. But if, on the other hand, it should turn out that Holyoake's beneficial interest was either *nil*, or was not coextensive with the whole of his apparent legal title, then I say any person dealing with Holyoake,[1] by way of equitable bargain or contract, should have known that he could only obtain a title which was imperfect, and would not bind the real beneficial owner. And, my Lords, he also might have known, and should have known, this, that if he desired to perfect his title, and make it entirely secure, he had the most simple means open to him, — he had only to take Holyoake at his word. If Holyoake represented that he was the real owner of these shares, the proposed transferee had only to go with Holyoake, or to go with the authority of Holyoake in his possession, to the company, and to require a transfer of those shares from the name of Holyoake into his own name. If he had obtained that transfer, and the company had made it, no question could have arisen, and no litigation could subsequently have taken place.

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[1] All that is material to the understanding of the case being contained in the judgment of the Lord Chancellor, the rest of the case is omitted. — ED.

[2] L. R. 8 Q. B. 420. — ED.

That being the state of things, your Lordships have on the one hand the directors clearly the equitable owners of the stock in question. You have, on the other hand, Mr. Robson, the person dealing with Mr. Holyoake for an equitable charge, having, in his power, if he was so minded, to obtain a perfectly valid legal charge, which would have made his title complete. Your Lordships have to deal with a case of a pre-existing and undoubted equitable title, and circumstances which are alleged to have defeated and to have taken away that pre-existing equitable title. My Lords, that pre-existing equitable title may be defeated by a supervening legal title obtained by transfer. And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and inure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that, in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.

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[1] Holyoake deposited the certificates with Robson as security, and covenanted to execute a legal mortgage of the shares on request. — ED.

I have anxiously striven to understand what were the circumstances or what was the line of conduct which is said in this case to operate to defeat the admitted equitable title, and I have been able to discover only four matters which are stated either separately or all together to have produced that effect.

My Lords, in the first place, the arguments at your Lordships' bar on behalf of the respondent appeared to me to go almost to this, that whenever you have an equitable owner who is the absolute owner, that is to say, entitled to the whole equitable interest, such a person ought not to have a trustee at all holding the *indicia* of legal ownership; or, if he chooses, for his own purpose, to have such a trustee, he must be in danger of suffering for every act of improper conduct by that trustee; and that, therefore, if the person entitled absolutely to the equitable interest in a share in a railway company, chooses for his own purpose to have that share standing in the name of a trustee for him, he will be bound not merely by a valid legal transfer of that share by the trustee, but by any equitable dealing or contract which the trustee may choose to enter into. My Lords, that is a very serious proposition. It goes not merely to shares, but it goes to land, and to every other species of property; and it goes to say that, whereas there is a large, well-known, recognized, and admitted system of trusts in this country, that system of trusts is to be cut down and moulded and reduced to this, that it is to be a system applicable only to infants, married women, or persons with limited interests; and that wherever the limited interest has ceased, and the equitable interest has become entire and complete without any limit, there the equitable owner is under some measure of obligation with regard to his duty of watching his trustee, an obligation which does not lie upon a limited owner. I find no authority for such a proposition, and I feel satisfied that your Lordships will not be disposed to introduce, for the first time, that as a rule of law.

What was the next circumstance founded upon? It was this, that the equitable owners, the directors, allowed this stock to stand in one name only. My Lords, is the doctrine now to be introduced for the first time, that a *cestui que trust* who has one trustee only is to be bound to exercise a greater amount of vigilance or to take further precautions than he would have to take if he had two or three trustees? What, then, is to be said to the case of there being two or three trustees, and one becoming the survivor? Is there, then, to be a fresh duty cast upon the *cestui que trust*, which, if he does not perform, he is to be in some danger from the act of that one trustee, and in some way to be responsible for that act for which he would not be responsible if there had been more trustees than one? I know of no authority for that proposition, and I think your Lordships will not be prepared to introduce now for the first time that new rule of law.

What, my Lords, was the next circumstance that was founded upon? It was this, that this one trustee had previously committed a breach of trust, and that the breach of trust had been condoned by the *cestuis que trust*. No doubt that which was in the eye of any court a breach of trust had been committed. It had been observed by the *cestuis que trust*, and the attention of the trustee had been called to it. He gave to the *cestuis que trust* a reason, which your Lordships may think to have been satisfactory or unsatisfactory, but which in point of fact was accepted by the *cestuis que trust*. Their confidence in the trustee does not appear to have been shaken; they evinced that confidence by allowing him to replace the stock in his sole name, and to have it in his sole name. They could have had no sinister or improper object in that, and they gave by that the strongest proof that they were satisfied that their trustee ought not to be held to have forfeited their confidence. But, my Lords, I repeat that here again is a suggestion that a new rule, entirely unknown in courts of equity, so far as I am aware, should be introduced; namely, that persons claiming by a subsequent equitable title are to be allowed to displace a previous equitable title by entering upon a review of the previous conduct of the trustee who has created, or attempted to create, a second equitable title, and if they can find any previous misconduct by him, to found upon that previous misconduct some claim to displace the previous equitable title.

Then, my Lords, in the fourth place, this circumstance was relied upon, that the *cestuis que trust* had allowed the trustee to have possession of the certificates of the shares. Now, a certificate of the shares or stock of a railway company is merely a solemn affirmation under the seal of the company that a certain amount of shares or stock stands in the name of the individual mentioned in the certificate. Undoubtedly the stock did stand in the name of Mr. Holyoake. If I am right, the directors were justified in having it in his name, and they were also justified in giving him the certificates, which did no more than tell that which any person would have found out by looking at their books; namely, that the stock stood in his name. It is said that there was some complete protection in the possession of the certificates, so that if the holder passed them over to another person, that other person would think he obtained a good title, because no transfer could be permitted without the production of the certificates. But, my Lords, whether a transfer should be permitted or not under those circumstances would be entirely within the discretion of the directors. They were not bound to permit a transfer without the production of the certificates; but, though not bound to permit a transfer, I apprehend they would not be in any way answerable if the transfer should be in any case made without the production of the certificates of the shares.

Therefore, my Lords, if we are to proceed, as your Lordships will proceed, upon the well-established system of trusts prevailing in this country, I cannot find that there was anything done by the *cestuis que trust* in this case which ought to forfeit and displace that equitable title of which, as I began by saying, they were clearly possessed.

The case would be entirely different if any misstatement had been made by the directors, if anything had been said by them to Mr. Robson, or if anything had been placed by them on the face of any document stating something which was not the truth, upon the faith of which Mr. Robson might have acted. That was the question which came before the court in the case of Rice *v.* Rice,[1] referred to at your Lordships' bar, and which appears to have been an authority acted upon by the Court of Exchequer Chamber. There a vendor, who unquestionably would have been held to have, in the eye of the court of equity, a lien for his purchase-money, for some purpose indorsed upon the deed a receipt for that purchase-money, stating that it had been paid. That was just the same thing as if he had stated that he had not a lien, or that he did not wish to insist upon a lien for the purchase-money; and it would have been contrary to the first principles of equity, and, indeed, of common sense, to say that, after that deed had been given by him to the purchaser, and the purchaser armed with that deed had created an interest in some third party on the faith of that statement, the vendor could subsequently come forward, and, as against that third party, claim to be put in possession of that lien which by the indorsement of that receipt he had virtually surrendered.

My Lords, the case of Waldron *v.* Sloper,[2] which was decided by the same learned judge, is a case also entirely separate and distinct from the present. There the incumbrancer, who had no interest whatever as a mortgagee, except by the delivery to him and the retainer by him of the title-deeds of the property, chose to give up those title-deeds. It is true that he gave them up upon an allegation that they were wanted for a temporary purpose; but in place of asking for them again, and of regaining the possession of them when that temporary purpose was satisfied, he allowed them to remain in the hands of the mortgagor for three or four years, and during that space of time, during which he was virtually leaving his security in the possession of another, that other by the possession of the title-deeds was enabled to create a fresh equitable mortgage, which was held, in consequence of the laches of the first mortgagee, to have priority over the first.

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[1] 2 Drew. 73.

[2] 1 Drew. 193.

My Lords, neither of those cases has, as it appears to me, any application to the present. The present appears to me to be simply the case of an ordinary trustee holding property of the kind in question for a *cestui que trust*, and an incumbrance created by the trustee, which can only carry to that fresh incumbrancer such interest as the trustee could give. The trustee could not give an interest as against his *cestui que trust*, and therefore it appears to me that the incumbrancer, now represented by the plaintiff in the *mandamus*, is not entitled to have the transfer in the company's books of the stock in question.

I therefore submit to your Lordships, and move, that the decision of the Court of Exchequer Chamber should be reversed, and that the judgment on the motion for a *mandamus* should be entered for the defendants.[1]

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[1] Pinkett *v.* Wright, 2 Hare, 120, 12 Cl. & F. 764 s. c.; Attorney-General *v.* Flint, 4 Hare, 147, 156; Manningford *v.* Toleman, 1 Coll. 670; Clack *v.* Holland, 19 Beav. 262, 274 (*semble*) (explaining Martin *v.* Sedgwick, 9 Beav. 333); Roberts *v.* Croft, 2 De G. & J. 1; Stackhouse *v.* Jersey, 1 J. & H 721; Cory *v.* Eyre, 1 D. J. & S. 149 (*semble*); Baillie *v.* McKewan, 35 Beav. 177; Newton *v.* Newton, L. R. 4 Ch. Ap. 143; 6 Eq. 135, s. c. (*semble*); Waldy *v.* Gray, 20 Eq. 238; *Re* Morgan, 18 Ch D. 93: New London Bank *v.* Brocklebank, 46 L. T. Rep. 339; Nat. Bank *v.* Jackson, 33 Ch Div. 1; Humber *v.* Richards, 45 Ch. D. 589; Ray *v.* Ferrell (Ind., 1891) 27 N. E. R. 159; Winborn *v.* Gorrell, 3 Ired. Eq. 117; Anketel *v.* Converse, 17 Ohio St. 11 (*semble*); Wood *v.* Maitland, 10 Phila. 84; 1 Leg. Chron. R. 348, s. c.; Pinson *v.* Ivey, 1 Yerg. 296, 338 (*semble*); Craig *v.* Leiper, 2 Yerg. 193; Pillow *v.* Shannon, 3 Yerg. 508; Briscoe *v.* Ashby, 24 Grat. 454 (*semble*) *Accord.* But see *contra*, St. Johnsbury *v.* Morrell, 55 Vt. 165.

Similarly, if one who has given an equitable mortgage upon property should afterwards sell or mortgage the same property to another, who was content to advance his money without exacting a conveyance of the legal title from the mortgagor, the rights of the first equitable mortgagee would be paramount Tylee *v.* Webb, 6 Beav. 552; Stevens *v.* Stevens, 2 Coll. 20; Allen *v.* Knight, 5 Hare, 272; 11 Jur. 527 (H. L.); Roberts *v.* Croft, 2 De G. & J. 1; Hunt *v.* Elmes, 2 D., F. & J. 578.

But if a *cestui que trust*, or equitable mortgagee, or other equitable claimant, by words or conduct encourages the belief that the trustee or mortgagor is the absolute beneficial owner of the property, he will of course be estopped to assert the trust or mortgage against a subsequent equitable incumbrancer who has acted on the faith of such words or conduct. Waldron *v.* Sloper, 1 Drew. 193; Rice *v.* Rice, 2 Drew. 73; Worthington *v.* German, 16 W. R. 187; Dowle *v.* Sanders, 2 H. & M. 242; Layard *v.* Maud, L. R. 4 Eq. 397; Hunter *v.* Walters, L. R. 7 Ch. Ap. 75; L. R. 11 Eq. 292, s. c.; Bickerton *v.* Walker, 31 Ch. D. 151; Farrand *v.* Yorkshire Co., 40 Ch. D. 182; Stoner *v.* Brown, 18 Ind. 464; Besson *v.* Eveland, 26 N. J. Eq. 468; Wilson *v.* Hicks, 40 Oh. St. 418. See also Union Bank *v.* Kent, 39 Ch. Div. 238; Niven *v.* Belknap, 2 Johns. 573; Leach *v.* Ansbacher, 55 Pa. 85. — Ed.

T. J. EYRE, Appellant, *v.* J. W. BURMESTER and Others, Respondents.

In the House of Lords, April 1, 4, 7, May 20, 1862.

[*Reported in* 10 *House of Lords*, 90.]

The Lord Chancellor (Lord Westbury).[1] My Lords, the facts material for the decision of this appeal are few, and may be shortly stated. In October, 1854, the late Mr. John Sadleir made a mortgage to the appellant, Mr. Eyre, of certain estates in Ireland, to secure the payment by Sadleir to Eyre of considerable sums of money. Afterwards, and in September, 1855, John Sadleir, being very largely indebted to the London and County Joint Stock Bank, conveyed these estates and other large estates in Ireland to the respondents, who represent the bank, to secure such debt and further advances then made by the bank to Sadleir. No mention was made by Sadleir to the respondents of the fact of the mortgage to Eyre; but the estates in question were conveyed by Sadleir to them as free from any encumbrance. Before this mortgage to the bank was completed by registration of the deeds in Ireland, the fact of Eyre's mortgage was discovered by the agents of the respondents, who therefore refused to allow the arrangement between Sadleir and themselves to remain unless he obtained a release from Eyre of the estates in question. This Sadleir engaged to do; and he prevailed upon Eyre to execute a deed of reconveyance to Sadleir himself of these estates, in consideration of Eyre's receiving from Sadleir other securities of equal or greater value. The substituted securities consisted chiefly of a large number of shares in the Royal Swedish Railway, and of a promissory note for £12,000, expressed to be made and signed by Mr. Dargan. But the shares were fictitious, having been fabricated by John Sadleir for the purpose, and the promissory note was a forgery. An actual fraud of a gross and criminal character was therefore committed by Sadleir upon Eyre; and by means of that fraud the release of Eyre's mortgage was obtained.

The release was contained in a deed dated the 5th, but executed on the 13th of October, 1855. By it Mr. Eyre reconveyed, granted, released, and confirmed unto John Sadleir the estates comprised in the mortgage deed of October, 1854. No consideration for this reconveyance is expressed in the deed itself, but the real agreement between the parties is contained in a contemporaneous agreement of the 6th of October, 1855.

After the execution of this deed of reconveyance to John Sadleir no further conveyance was made by Sadleir to the respondents. They were assured of the fact of the reconveyance, and the mortgage was either completed or allowed to continue. The estate so reconveyed by Eyre remained in John Sadleir until he committed suicide in the month of February, 1856. On that event, the fraud of Sadleir was discovered.

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[1] See *supra*, 70, n. 1. The concurring opinions of Lord Cranworth and Lord Chelmsford are also omitted. — Ed.

These estates have been since sold by an order of the Encumbered Estates Court in Ireland. With respect to the proceeds of that sale, a contest has arisen between Eyre and the London and County Bank; Eyre claims the benefit of his original mortgage, and insists that the reconveyance is void for fraud. The bank directors claim the benefit of the reconveyance as purchasers for valuable consideration, without notice of the fraud committed by Sadleir on Eyre, and on that ground the court below has given judgment in their favor.

A purchaser for valuable consideration without notice will not be deprived by a court of equity of any advantage at law which he has fairly obtained for his protection. But in the present case the estate reconveyed by Eyre, remained in Sadleir, and was never conveyed by Sadleir to the bank. In answer to this objection, the respondents insist on the estoppel created by the previous conveyance. This answer would be good as against Sadleir and all claiming under him. The estoppel created by the antecedent contract and conveyance by Sadleir would bind parties and privies, that is, Sadleir and those claiming under him. But the claim of Eyre is against Sadleir by paramount right, to recover the estate of which Eyre had been deprived by fraud, and Sadleir acquired no interest to feed his prior contract by virtue of that fraudulent transaction.

It is urged by the respondents that the reconveyance when made by Eyre enabled Sadleir to obtain money from the bank, and that the mortgage was completed on the faith of the reconveyance. The evidence does not appear to me to prove either of these positions. But granting that it does, the reconveyance was to Sadleir and was obtained by him by fraud and covin. There was no contract or direct communication between the respondents and Eyre, who acted with perfect *bona fides*. The respondents left Sadleir to obtain the reconveyance, and they can claim the benefit of it only under Sadleir, whose act they must take as it is. If (which is not proved) they had advanced money to Sadleir on the faith of the release and their actual possession of it, but without taking a conveyance, they might have had a lien on the deed itself; but their interest in the estate being equitable only would still, in my opinion, have been subject to the superior equity of Eyre.[1] Whilst the estate remained in Sadleir, so long was it liable to be pursued and recovered by Eyre. But there is no sufficient proof of any such advance by the bank; and the only foundation of the bank's claim is the mortgage by Sadleir prior to the deed of reconveyance. That mortgage and contract would bind any interest subsequently acquired by Sadleir. But under the reconveyance he obtained none; for, as between Sadleir and Eyre, the latter was still the owner, and might at any time during the life of Sadleir, by bill in equity have set aside the release, and obtained a reconveyance of the estate, and an interim injunction to restrain any alienation of it by Sadleir. This equitable title still remains unimpaired, and ought to be preferred to any claim by the bank.

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[1] Parker *v.* Clarke, 30 Beav. 54 (but see French *v.* Hope, 56 L. T. Rep. 57); Peabody *v.* Fenton, 3 Barb. Ch. 451, 464–5 *Accord.* See also the analogous cases of bills of exchange, *supra,* p. 000, n. 0. — ED.

I therefore advise your Lordships that the orders of the court below be reversed, and that it be declared that the claim of the appellant to priority in respect of his mortgage, ought to have been allowed; and that the case be remitted, with that declaration, to the Landed Estates Court. If the appellant has obtained any additional security under the agreement of the 6th October, 1855, not comprised in his original mortgage, that must be given up or accounted for to the bank.[1]

CAVE *v.* MACKENZIE.

In Chancery, before Sir George Jessel, M. R. April 20, 1877.

[*Reported in* 46 *Law Journal Reports, Chancery*, 564.]

The defendant William Franks Mackenzie entered into a contract in writing for the purchase of a freehold farm at the price of £4,600, and afterwards assigned the benefit of the contract to his son, the defendant James Talfourd Mackenzie, in consideration of a debt alleged to be due from the former to the latter for his services. The claim in the action, to which the vendor was not a party, was for a declaration that William Franks Mackenzie entered into and signed the contract as agent for the plaintiffs, and not as purchaser on his own account, and for an injunction and damages. An issue was directed, and the jury found a verdict for the plaintiffs in terms of the above declaration.

The action now came on upon motion for judgment. William Franks Mackenzie by his defence claimed the benefit of the Statute of Frauds, and James Talfourd Mackenzie by his defence insisted that he was a purchaser for value from his father without notice of the alleged agency.

Mr. Davey and *Mr. Romer*, for the plaintiffs.

Mr. Chitty and *Mr. Cracknall*, for the defendants.

The Master of the Rolls. — I must say that I am surprised at the way in which this case has been contested after the verdict of a jury. The case made by the plaintiffs is one of extreme simplicity. It is that the defendant William Franks Mackenzie was instructed by them to buy a farm for £4,600; that William Franks Mackenzie entered into the contract in his own name; and afterwards finding that it was a beneficial contract, asserted that he was beneficial owner in equity of the estate, and denied that he was, as the jury have found he was, the agent of the plaintiffs in buying it. Furthermore it appears that with a view of preventing the plaintiffs obtaining the benefit of the contract, which is still a contract at this present moment, he made an agreement with his son, the defendant James Talfourd Mackenzie, and in consideration of a sum of money due to him, or alleged to be due to him for his services, transferred to James Talfourd Mackenzie his alleged equitable interest under the contract.

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[1] Heath *v.* Crealock, 10 Ch. 22; Kelley *v.* Jenness, 50 Me. 455; Jackson *v.* Mills, 13 Johns 463; Sinclair *v.* Jackson, 8 Cow. 587; Jackson *v.* Hoffman, 9 Cow. 271; Burchard *v.* Hubbard, 11 Oh. 316; Buckingham *v.* Hanna, 2 Oh. St. 555; Gregory *v.* Peoples, 80 Va. 355 *Accord.* — Ed.

163 Ky. 428.

James Talfourd Mackenzie claims the benefit of such interest as purchaser for value without notice, and prays the same benefit of this defence as if he had raised the same by plea. William Franks Mackenzie asks to have the benefit of the statute passed for the prevention of frauds and perjuries, that is, for the prevention of the very thing of which he has been convicted, and he has the good sense and sound judgment to instruct counsel to argue that the statute passed for that purpose is to prevent the only order which I can make against him, which is, that he pay the costs of the litigation occasioned by such fraud.

The defences, like all legal defences, must be considered and decided without reference to the behavior of any party to the litigation, and I must say whether they are well founded in law. First of all I will deal with the defence of James Talfourd Mackenzie. He has only claimed the benefit of being a *bona fide* purchaser for value without notice, and upon that the plaintiffs have very properly not taken issue, because it is immaterial. If they have a prior claim to the estate, the question whether the whole transaction between the father and son was a sham or not is entirely unnecessary to be tried; because in equity that which is prior in time is better in title. If the plaintiffs are right they will therefore be entitled to judgment as against James Talfourd Mackenzie. As far as he is concerned there is no doubt about giving what they claim. They are, in fact, purchasers, through William Franks Mackenzie, their agent, and to give them what they claim seems to be a matter of course.[1]

I am of opinion that the defendant, William Franks Mackenzie, ought to pay the costs of the litigation. The order as to costs will go against both defendants.[2]

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[1] The rest of the opinion, in which the learned judge decided that the agent could not set up the Statute of Frauds to defeat the plaintiff's claim, is omitted, as well as the arguments of counsel. — Ed.

[2] Moore *v.* Jervis, 2 Coll 60; Brandon *v.* Brandon, 7 D. M. & G. 365; Cory *v.* Eyre, 1 D., J. & S. 149; *Re* European Bank, L. R. 5 Ch. Ap. 358; Cowdrey *v.* Vandenburgh, 101 U. S. 572 (*semble*); Robeson *v.* Roberts, 20 Ind. 155, 161; Sims *v.* Wilson, 47 Ind. 228; Summers *v.* Hutson, 48 Ind. 228; Kastner *v.* Pibilinski, 96 Ind. 229; Moore *v.* Moore, 112 Ind. 149; Ames *v.* Richardson, 29 Minn. 330; Turner *v.* Hoyle, 95 Mo. 337; Johnson Co. *v.* Boyden, 27 Mo. Ap. 341; (but see *contra*, Garland *v.* Harrison, 17 Mo. 282;) Stafford *v.* Van Rensselaer, Hopk. 569; 9 Cow. 316, s. c.; Bush *v.* Lathrop, 22 N. Y. 535 (*semble*); Schafer *v.* Reilly, 50 N. Y. 61

48 O.S. 1.
38 S.C. 138.
109 A.C. 150

(*semble*); Trustees *v.* Wheeler, 61 N. Y. 88; Greene *v.* Warnick, 64 N. Y. 220; Delancey *v.* Stearns, 66 N. Y. 157; Crane *v.* Turner, 67 N. Y. 437; Reid *v.* Sprague, 72 N. Y. 457 (*semble*); Westbrook *v.* Gleason, 79 N. Y. 23; Decker *v.* Boice, 83 N. Y 215; Simpson *v.* Del Hoy, 94 N. Y. 689 (*semble*); Fairbanks *v.* Sargent, 104 N. Y. 108; (but see *contra*, Murray *v.* Lylburn, 2 Johns. Ch. 441, and Livingston *v.* Dean, 2 Johns. Ch. 479, per Mr. Chancellor Kent; James *v.* Morey, 2 Cow. 247, 297;) Downer *v.* South Royalton Bank, 39 Vt. 25 *Accord.*

But see *contra*, Nat. Bank *v.* Texas, 20 Wall. 72, 89; Porter *v.* King, 1 Fed. Rep.
33 Mass 511 755 (*semble*) Olds *v.* Cummings, 31 Ill 188, 192 (*semble*); Sumner *v.* Waugh,
45 N. Ia 82 53 Ill. 531, 538 (*semble*); Silverman *v.* Bullock, 98 Ill. 11; Crosby *v.* Tanner, 40
71 Minn. 139 Iowa, 36; Ohio Co. *v.* Rees, 2 Md Ch. 25, 37 (*semble*); Bloomer *v.* Henderson,
56 Neb. 379 Mich. 395 (see Terry *v.* Tuttle, 24 Mich. 214); Hibernian Bank *v.* Everman, 52 Miss. 500 (*semble*), Losey *v.* Simpson, 3 Stockt. 246; Woodruff *v.* Depue, 1 McCart. 168; Shannon *v.* Marselis, Saxt. 413; Reilly *v.* Mayer, 1 Beas. 55; Lavallette *v.* Thomson, 2 Beas. 274; Starr *v.* Haskins, 26 N. J. Eq. 414; De Witt *v.* Van Sickles, 29 N. J. Eq. 209 (*semble*); Grocer's Bank *v.* Neet, 29 N. J. Eq. 449 (*semble*); Traphagen *v.* Hand, 36 N. J. Eq. 384; (but see s. c. 38 N. J. Eq. 613; and Conover *v.* Van Mater, 18 N. J. Eq. 481;) Mott *v.* Clarke, 9 Barr, 399; McConnell *v.* Wenrich, 16 Pa 365; Hendrickson's Appeal, 24 Pa. 363; Wethrill's Appeal, 3 Grant, 281; Pryor *v.* Wood, 31 Pa. 142; Mullison's Estate, 68 Pa. 212, 216; Kountz *v.* Kirkpatrick, 72 Pa. 376, 385; Appeal of Mifflin Bank, 98 Pa. 150; Moore *v.* Holcombe, 3 Leigh, 597 (*semble*); Gordon *v.* Rixey, 76 Va. 694; Stoner *v.* Harris, 81 Va. 451; Kellogg *v.* Fancher, 24 Wis. 21. Most of the preceding cases *contra* were founded upon certain dicta of Mr. Chancellor Kent in Murray *v.* Lylburn, 2 Johns. Ch. 441, and Livingston *v.* Dean, 2 Johns. Ch. 479 (see also James *v.* Morey, 2 Cow. 247, 297); but these dicta have been expressly repudiated in New York. See cases cited *supra* in the preceding paragraph.

PURCHASE FROM THE FRAUDULENT ASSIGNEE OF A CHOSE IN ACTION. — If the owner of a chose in action is induced by fraud to assign the same in writing, and the fraudulent assignee assigns in turn to an innocent purchaser, the defrauded assignor is postponed to the purchaser. Ashwin *v.* Burton, 32 L. J. Ch. 196; Colonial Bank *v.* Cady, 15 App. Cas. 267 (*semble*); Pochin *v.* Robinous (Court of Session 1869), 7 R. 622; Talty *v.* Freedman's Co., 93 U. S. 321 (*semble*); Cowdrey *v.* Vandenburgh, 101 U. S. 572 (*semble*); Adams *v.* District, 17 Ct. Cl. 351; Ambrose *v.* Evans, 66 Cal. 74, Arnold *v.* Johnson, 66 Cal. 402; Otis *v.* Gardner, 105 Ill. 436; Campbell *v.* Brackenridge, 8 Blackf. 471 (*semble*); Moore *v.* Moore, 112 Ind. 199; Plummer *v.* People's Bank, 65 Iowa, 405; Eversole *v.* Maule, 50 Md 95; Cochran *v.* Stewart, 21 Minn. 435; Etheridge *v.* Gallagher, 55 Miss. 458, International Bank *v.* German Bank, 71 Mo 183, Lea *v.* Turner, 89 Mo 487; Neuhoff *v.* O'Reilly, 93 Mo. 164; Putnam *v.* Clark, 29 N. J. Eq. 412; Grocer's Bank *v.* Neet, 29 N. J. Eq. 449; Moore *v.* Metropolitan Bank, 55 N. Y. 41; (compare Merchants' Bank *v.* Livingston, 74 N. Y. 223;) Combes *v.* Chandler, 33 Ohio St 178; (but see Osborn *v.* McClelland, 43 Oh. St. 284;) Taylor *v.* Gitt, 10 Barr, 428 Linnard's App., 34 Alb. L. J. 316; (compare Leiper's App. 108 Pa. 377;) State Bank *v.* Hastings, 15 Wis 75.

But see *contra*, Cockell *v.* Taylor, 15 Beav. 103; Barnard *v.* Hunter, 2 Jur. N. S. 1213; Taliaferro *v.* First Bank, 71 Md. 200, 214 (*semble*); Poillon *v.* Martin, 1 Sandf. Ch. 539; Covell *v.* Tradesman's Bank, 1 Paige. 131; Bush *v.* Lathrop, 22 N. Y. 535; Cutts *v.* Guild, 57 N. Y. 229. See also Donnell *v.* Thompson, 13 Ala. 440; Blackman *v.* Lehman, 63 Ala. 547.

The decisions in favor of the purchaser are commonly put upon the ground that the defrauded assignor is estopped from asserting his ownership. For a criticism of this doctrine and a suggestion of a more satisfactory principle leading to the same result, see 1 Harv. L. Rev. 7–8. If the first assignment is procured by duress it has been thought that the intimidated assignor should prevail against the innocent purchaser. Barry *v.* Equitable Society, 59 N. Y. 587 (*semble*); see also, Whitridge *v.* Barry, 42 Md. 140. But this view seems unsound. 1 Harv. L. Rev. 8. A mere bailment of a chose in action, without a written assignment, will not preclude the bailor from reclaiming the chose in action from an innocent purchaser from a bailee. Midland Co *v.* Hitchcock, 37 N. J. Eq. 549. See also Combs *v.* Hodge, 21 How. 397. — ED.

CAVE *v.* CAVE.

IN CHANCERY, BEFORE SIR EDWARD FRY, J., APRIL 20, 23, 1880.

[*Reported in* 15 *Chancery Division*, 639.]

THE plaintiffs were the *cestuis que trust* under the settlement executed on the marriage of Mr. and Mrs. Frederick Cave on the 27th of January, 1863. On the 27th of November, 1867, the defendant Charles Cave was appointed trustee of the settlement, and in the year 1871 he became the sole trustee.

The trust funds, which were at that time in his hands, consisted of £3,600 advanced on mortgage and £276 consols. Out of these sums £1,950 and £702 17s. 6d. were improperly invested in the purchase of certain lands at Wandsworth in the following manner: —

Charles Cave, the trustee, received the trust moneys which had been secured on mortgage in 1872, and paid it to an account in the National and Provincial Bank in the joint names of himself and his brother Frederick Cave. A cheque was drawn on this account in June, 1872, by the two in favor of Frederick Cave, and the money was laid out in the purchase of freehold land at Wandsworth. Charles Cave acted in the purchase as trustee of the settlement and also as solicitor of himself and of Frederick Cave, and the conveyance of the property was made to Frederick Cave, and the deeds relating to the property were held by Charles Cave, the trustee of the settlement.

In September, 1872, another cheque was drawn by Charles Cave and Frederick Cave on their banking account in favor of the Accountant-General of the Court of Chancery, and the proceeds were applied in purchasing other land at Wandsworth, and the conveyance of the land was prepared by Charles Cave, and was made to Frederick Cave.

The defendant Philip Chaplin, on the 10th of February, 1873, advanced to Frederick Cave £2,500 on a first mortgage of the land thus improperly purchased, which contained absolute covenants for title by Frederick Cave. Charles Cave acted as the solicitor of Philip Chaplin in relation to the said advance, and stated that the land belonged to one of his brothers, and the question arose whether Philip Chaplin had or had not constructive notice through Charles Cave who so acted as his solicitor, that the said lands had been purchased with and represented the trust moneys subject to the trusts of the settlement.

In October, 1873, the defendant John White advanced £1,800 on the same property without notice of the first mortgage, and on this occasion Charles Cave wrote a letter to Mr. White stating that Frederick Cave had lately bought the freehold house and land at Wandsworth, which had compelled him to withdraw some of his capital from his business.

The other defendants, W. Nichols and Haslam, Appleton, & Company, also advanced money on subsequent mortgages of the same land to Frederick Cave, and in 1874 Philip Chaplin, the first mortgagee, made further advances on the same security.

In 1875 Frederick Cave, who had been in business with George Cave, dissolved partnership upon the terms of his paying to George Cave £5,000, £2,250 of which was secured by a mortgage of the same lands. In this case, however, Mr. Justice Fry was of opinion that George Cave had actual notice of the breach of trust.

In April, 1879, Frederick Cave became a bankrupt, and the plaintiffs claimed to prove against his estate for these breaches of trust, and they also claimed priority over all the liens claimed on the land by the several defendants, on the ground that when they took their charges they had constructive notice of the breach of trust.

The defendants denied that they had notice, and relied especially on the fraud of Charles Cave as a circumstance raising a presumption that he would not have communicated the circumstances of his fraud to the mortgagees.

Cookson, Q. C., and *Everitt*, for the plaintiffs.

Fischer, Q. C., and *W. H. Cochran*, for the first mortgagee, Philip Chaplin.

Warmington, for a subsequent mortgagee.[1]

FRY, J., stated the facts, and continued: —

The question before me concerns the priority of the liens or charges claimed against the Wandsworth property. The plaintiff's right to a charge against the original purchaser of the property, Frederick Cave, is not and could not be in dispute. The question, however, arises between persons who claim subsequently to the original purchase by the trustee, or rather by Frederick Cave, who obtained the money from the trustee.

It appears that after the two conveyances were made to Frederick Cave in June and September, 1872, Frederick Cave, in February, 1873, mortgaged the property to the defendant Philip Chaplin for the sum of £2,500, and subsequent advances were made by Chaplin which bring the amount in all up to £5,550. With regard to the last of those advances, the sum of £550, it was subsequent to Mr. White's advance, and it has not been contended that it can have priority over that. Between the plaintiff and Chaplin the course of argument has been this: It has been proved that the same solicitor, Mr. Charles Cave, who was also surviving trustee, acted in the matter of Chaplin's mortgage both for Chaplin and for the mortgagor, Frederick Cave....

The conclusion I arrive at is, that Chaplin has sustained the burden cast upon him of proving that the circumstances are such as repel the construction or imputation to the principal of notice to the agent. Therefore I hold that Mr. Chaplin's mortgage has a priority over the plaintiffs'.

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[1] The arguments of counsel are omitted together with a part of the opinion relating to the question of constructive notice to Chaplin. — ED.

The next question arises between the plaintiffs and White, and also between all the other incumbrancers upon the fund. That question is of this nature: all these incumbrancers allege that they are purchasers for value without notice, and they plead that, being purchasers for value without notice, they have a sufficient and conclusive defence. That defence, as we all know, has been the subject of a great deal of decision, and it is by no means easy to harmonize the authorities and the opinions expressed upon the subject. Criticisms upon old cases lie many strata deep, and eminent Lord Chancellors have expressed diametrically opposite conclusions upon the same question. The case of Phillips *v.* Phillips is the one which has been principally urged before me, and that, as being the decision of a Lord Chancellor, is binding upon me, notwithstanding the subsequent comments upon it of Lord St. Leonards in his writings. That case seems to me to have laid down this principle, that, as between equitable interests, the defence will not prevail where the circumstances are such as to require that this Court should determine the priorities between them. The classes of cases to which that defence will apply are other than that. Lord Westbury in the course of his judgment in that case said this: "I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more. If, therefore, a person seised of an equitable interest (the legal estate being outstanding), makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, namely, the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrances claiming in equity take and are ranked according to the date of their securities, and the maxim applies, '*Qui prior est tempore potior est jure.*' The first grantee is *potior* — that is, *potentior*. He has a better and superior — because a prior — equity." His Lordship then proceeded to explain the different classes of cases in which that defence is available, and the one which has been relied upon as bringing the case of the defendants within the decision of Lord Westbury is the third class, which is this, that "where there are circumstances that give rise to an equity as distinguished from an equitable estate — as, for example, an equity to set aside a deed for fraud, or to correct it for mistake — and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere."

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Now the question I have to determine is this, is the right of the parties to follow this money into the land an equitable estate or interest, or is it an equity as distinguished from an equitable estate? The decision of Lord Eldon many years ago appears to me to be perfectly conclusive upon the law. I refer to the case of Lewis *v.* Madocks,[1] where on further consideration directions had been given for an inquiry as to certain trust moneys which had gone into land, the wife claiming an interest in the land as against the heir; and Lord Eldon said this: "The claim of the wife is put in this way, that personal property bound by the trust or obligation, whatever it is called, of this bond is traced into the purchase of a real estate, which estate must therefore be hers; but I do not know any case in its circumstances sufficiently like this to authorize me to hold that doctrine. I am prepared to say that the personal estate bound by this obligation, and which has been laid out in this real estate, is personal property that may be demanded out of the real estate; that the estate is chargeable with it; but it was not so purchased with it, that the estate should be decreed to belong not to the heir but to the wife." In other words, his Lordship held that the estate descended to the heir subject to the charge. That charge appears to me to be a charge in equity, or, in other words, an equitable estate or interest. Very similar was the question which Vice Chancellor Kindersley had to determine in the case of Rice *v.* Rice.[1] He had there to adjudicate between two equities, one arising from the right of an unpaid seller to come upon the land, and the other arising by contract creating an equitable mortgage. It is a very leading and instructive case, in which the Vice Chancellor considered very fully the application of the maxim, "*Qui prior est tempore potior est jure*," and laid it down thus: "To lay down the rule with perfect accuracy, I think it should be stated in some such form as this. As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity, or, '*Qui prior est tempore potior est jure*.'" He then went on to consider and weigh the two equities set one against the other in that suit, and then he says: "Each of the parties in controversy has nothing but an equitable interest; the plaintiff's interest being a vendor's lien for unpaid purchase-money, and the defendant Ede having an equitable mortgage. Looking at these two species of equitable interests abstractedly and without reference to priority of time, or possession of the title deeds, or any other special circumstances, is there anything in their respective natures or qualities which would lead to the conclusion that in natural justice the one is better or more worthy or more entitled to protection than the other? Each of the two equitable interests arises out of the forbearance by the party of money due to him. ~~There is, however,~~ this difference between them, that the vendor's lien for unpaid purchase-money is a right created by a rule of equity without any special contract; the right of the equitable mortgagee is created by the special contract of the parties. I cannot say that in my opinion this constitutes any sufficient ground of preference, though, if it makes any difference at all, I should say it is rather in favor of the equitable mortgagee, inasmuch as there is no *constat* of the right of the vendor to his lien for unpaid purchase-money until it has been declared by a decree of a Court of Equity, whereas there is a clear *constat* of the equitable mortgagee's title immediately on the contract being made. But I do not see in this any sufficient ground for holding that the equitable mortgagee has the better equity."

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[1] 17 Ves. 48, 57.

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[1] 2 Drew. 73.

In my judgment, the right of a vendor for the unpaid purchase-money is an equitable lien, and the right of the *cestuis que trust*, whose trust money has been invested in the lands, is also an equitable lien. I do not think I can really distinguish this equity from such an equitable lien as the Vice Chancellor held to be in that case an equitable estate or interest of the same description as the equity of an equitable mortgagee. Therefore, I shall conclude that, within the case of Phillips *v.* Phillips, the interest of the plaintiff in this case is an equitable interest, and not merely an equity like the equity to set aside a deed, and therefore it must take its priority according to the priority of date.[1]

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[1] Daubeny *v.* Cockburn, 1 Mer. 626; *Re* Vernon, 33 Ch. Div. 402; 32 Ch. D. 165 (*semble*); Carritt *v.* Real Co., 42 Ch. D. 263 *Accord.*

Sturge *v.* Starr, 2 M. & K. 195; Lane *v.* Jackson, 20 Beav. 535; Penny *v.* Watts, 2 De G. & Sm. 501; *Re* Ffrench's Est., 21 L. R. Ir. 283, *Contra.* — Ed.

A trustee fraudulently used the trust money f e purchs o land, in collsn w a third party, e conveyance bing t J. Ltr T ma sub mortgs o e land f advances.
Held: Cestui prvls over all mtges, except 1st.

NOTE.

WHEN TRUST PROPERTY IS INCLUDED IN A GENERAL CONVEYANCE OR DEVISE BY A TRUSTEE.

WHETHER a general conveyance or devise by a trustee is confined in its operation to property in which the trustee has a beneficial interest, or includes also property held by him simply as trustee, is a question of intention to be gathered from the whole scope of the deed or will.

CONVEYANCE INTER VIVOS. — In Fausset *v* Carpenter, 5 Bligh, N. S. 75; 2 Dow & Cl. 232, S. C.; Anderson *v.* Raikes, 1 Stark. 155; Abbot, 55 Me. 580, it was decided that the legal title to trust property did not pass by a general conveyance by the trustee. This interpretation was adopted upon the ground that an intention to commit a breach of trust should not be imputed to the trustee without express evidence of such an intention. The case of Fausset *v* Carpenter is criticised, however, with some severity in Sugden's Law of Property, 76.

WILLS. — On the other hand, the legal title to trust property will pass by a general devise by the trustee, unless the will discloses an intention to restrain its operation to property in which the testator had a beneficial interest. Marlow *v.* Smith, 2 P Wms. 198; *Ex parte* Sergison, 4 Ves 147 (*semble*); Braybrooke *v.* Inskip, 8 Ves. 417 (overruling Attorney-General *v.* Buller, 5 Ves. 339); *Ex parte* Shaw, 8 Sim. 159; Bainbridge *v.* Ashburton, 2 Y. & C. Ex. 347; Sharpe *v.* Sharpe, 12 Jur. 598; Langford *v.* Auger, 4 Hare, 313; Lewis *v.* Mathews, L. R. 2 Eq. 177; Taylor *v.* Benham, 5 How. 233, 270; Richardson *v.* Woodbury, 43 Me. 206 (*semble*); Ballard *v.* Carter, 5 Pick. 112 (*semble*); Cooper *v.* Cooper, 1 Hal. Ch. 9; Wills *v.* Cooper, 1 Dutch. 137 (*semble*); Jackson *v.* Delancy, 13 Johns. 537; Merritt *v.* Farmers' Co., 2 Edw. 547 (*semble*); Heath *v.* Knapp, 4 Barr, 228.

Any disposition of the property, however, which would be improper unless the testator had the beneficial interest therein, is sufficient to exclude trust property from the operation of the will; *e. g.*, —

A Devise subject to Debts, Annuities, or Legacies. — Reade *v.* Reade, 8 T. R. 118; *Ex parte* Morgan, 10 Ves. 101; Rackham *v.* Siddall, 16 Sim. 297; 1 McN. & G. 607, S. C.; Doe *v.* Lightfoot, 8 M. & W. 553 (*semble*); Hope *v.* Liddell, 21 Beav. 183; Life Association *v.* Siddal, 3 D., F. & J. 58; *Re* Smith's Estate, 4 Ch. D. 70; *Re* Bellis's Trusts, 5 Ch. D. 504 (impugning *Re* Brown, 3 Ch. D. 156, *contra*).

A Devise upon Trust to sell. — *Ex parte* Marshall, 9 Sim. 555; *Re* Morley's Will, 10 Hare, 293; *Re* Packman, 1 Ch. D. 214; *Re* Smith's Estate, 4 Ch. D. 70; Surrey Co. *v.* Kerr, W. N. (1878), 163 (but see Wall *v.* Bright, 1 J. & W. 494, criticised in Lysaght *v.* Edwards, 2 Ch. D. 499); Richardson *v.* Woodbury, 43 Me. 206; Merritt *v.* Farmers' Co., 2 Edw. 547; Nightingale *v.* Nightingale, 13 R. I. 113.

A Devise to several as Tenants in Common. — Martin *v.* Laverton, L. R. 9 Eq. 563, 568 (*semble*). See Doe *v.* Lightfoot, 8 M. & W. 553; *Re* Morley's Will, 10 Hare, 293; *Re* Finney's Estate, 3 Giff. 465; Thirtle *v.* Vaughan, 2 W. R. 632; 24 L. Times, 5, S. C.

A Devise to Several Persons with a Right of Accruer. — Thirtle *v.* Vaughan, 2 W. R. 632; 24 L. Times, 5, S. C. See also *Ex parte* Brettell, 6 Ves. 576 (explained in 8 Ves. 434).

A Devise to an Unascertained Class. — *Re* Finney's Estate, 3 Giff. 465.

A Devise to the Separate Use of a Woman. — Lindsell *v.* Thacker, 12 Sim. 178.

A Devise in Strict Settlement. — Thompson *v.* Grant, 4 Mad. 438.

A Devise to the Cestui que Trust being an Infant. — Wills *v.* Cooper, 1 Dutch. 137.

GENERAL CONVEYANCE OR DEVISE BY A MORTGAGEE. — The legal title to mortgaged property will of course pass by a general conveyance or devise by the mortgagee, unless a contrary intention appears by the deed or will. Sir Thomas Littleton's

Case, 2 Vent 351; *Ex parte* Bowes, 1 Atk. 605, n. 1; Ballard *v.* Carter, 5 Pick 112. Furthermore, as a mortgagee, unlike a trustee, has a beneficial interest in the property, the legal title will pass notwithstanding the property is conveyed or devised subject to a charge for the payment of debts, legacies, or annuities Wynn *v.* Littleton, 1 Vern. 3; 1 Atk. 605, n. 1, s. c.; *Re* Stevens, L. R 6 Eq 597; Lewin, Trusts (7th ed.), 209, 210. See also *Re* Smith's Estate, 4 Ch. D. 70, 72. But see *contra*, Doe *v* Lightfoot, 8 M. & W. 553, 1 Jarman, Wills (4th ed), 701.

In the following cases the terms of the will were thought to be inconsistent with an intention of the mortgagee to dispose of the legal title to the mortgaged property; *e. g.*: —

A Limitation of the Property in Strict Settlement — Braybrooke *v.* Inskip, 8 Ves. 434 (*semble*); Thompson *v* Grant, 4 Mad. 438; Galliers *v.* Moss, 9 B & C. 267 (but see *Ex parte* Bowes, 1 Atk. 605, n 1).

A Devise to an Unascertained Class — *Re* Finney's Estate, 3 Giff. 465.

A Devise upon Special Trusts. — *Re* Horsfall, McCl. & Y. 292; Martin *v.* Laverton, L R. 9 Eq. 563; *Re* Packman, 1 Ch D. 214. See also Leeds *v.* Munday, 3 Ves. Jr. 348; Breckinridge *v.* Waters, 4 Dana, 620.

It is hardly necessary to add, that when the legal title to trust property passes by the will of the trustee, the devisee takes the same subject to the trust. Marlow *v.* Smith, 2 P. Wms. 201, Grenville *v.* Blyth, 16 Ves. 231. — ED.

GIDDINGS AND COLEMAN *v.* EASTMAN AND WIFE.

IN CHANCERY, NEW YORK, BEFORE R. H. WALWORTH, C., MARCH 15, 1831.

[*Reported in* 5 *Paige*, 561]

THIS was an appeal from a decree of the Vice Chancellor. The premises in controversy were conveyed in November, 1810, to C. Blanchard, who, however, held them as a constructive trustee for the complainants. Blanchard died in April, 1811, intestate, and without issue, leaving his sister Abigail, the wife of the defendant Eastman, and four other sisters, his heirs-at-law. Eastman purchased the rights of his four sisters-in-law, paid them therefor, and took conveyances from them without any notice of the trust in favor of the complainants.[1]

J. C. Spencer for the complainants.

F. M. Haight for the defendants.

THE CHANCELLOR. It is insisted, however, by the complainants' counsel, that as Eastman and wife held an undivided share of the premises, in right of the wife, as one of the heirs-at-law of Blanchard, charged with the trust, although they were both ignorant of the fact that any such trust existed, it was impossible for Eastman to become a *bona fide* purchaser of the undivided shares of the other four heirs-at-law. This position cannot be sustained upon any principle of equity. The cases referred to by the complainants' counsel, upon this point, are cases in which a trustee holding the estate for another has taken advantage of his situation to purchase in an outstanding title, or to secure some advantage which, in equity, it was his duty to purchase or secure for the benefit of his *cestui que trust;* or where, from the situation of the purchaser in reference to others, it might be presumed he intended to make the purchase for his and their joint benefit. But where one devisee or heir-at-law is by construction turned into a trustee without any knowledge on his part that he is such trustee, or of the facts which make him a trustee constructively, it appears to be impossible to hold that he may not be a *bona fide* purchaser of the undivided share of another tenant in common in the same property, as to which he is equally ignorant that any trust exists. The conclusion of the Vice Chancellor was therefore right, that Eastman acquired a valid title to four-fifths of the premises, by purchase from the heirs, and that he now holds that portion of the premises, discharged of the trust which attached to it in the hands of the heirs.

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[1] The statement of the case has been much abridged. The arguments of counsel are omitted, together with a part of the Chancellor's opinion. — ED.

Pt

The decree appealed from is affirmed, with costs; and the proceedings are to be remitted to the Vice Chancellor.[1]

THE THIRD NATIONAL BANK *v.* JOHN H. LANGE & OTHERS.

IN THE COURT OF APPEALS, MARYLAND, OCTOBER TERM, 1878.

[*Reported in* 51 *Maryland Reports,* 138.]

APPEAL from the Circuit Court of Baltimore City.

This was a proceeding in equity by the appellee, Lange, against the appellant and others, to enjoin the appellant from collecting or attempting to collect a promissory note, purchased by it, but equitably belonging to the appellee Lange, or from protesting it, or taking any further steps in regard thereto. The injunction ordered to be issued, was served upon the appellant three days before the maturity of the note. The case is further stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY, and ROBINSON, JJ.

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[1] For instances where innocent volunteers, as in the principal case, were charged as constructive trustees, see Pye *v.* George, 2 Salk. 680, Mansell *v.* Mansell, 2 P. Wms. 678, 681; Luttrell *v.* Olmius, 11 Ves. 638 (cited), Bell *v.* Bell, Ll. & G. 44, 58; Greiner *v.* Greiner, 58 Cal. 115, 123; Hazletine *v.* Fourney, 120 Ill. 493; Derry *v.* Derry, 74 Ind. 560, Cobb *v.* Knight, 74 Me. 253; Shaler *v.* Trowbridge, 28 N. J. Eq. 595; Lyford *v.* Thurston, 16 N. H. 399; Savage *v.* McCorkle, 17 Oreg. 42; Kennedy *v.* Baker, 59 Tex. 150; Everett *v.* R. R. Co., 67 Tex. 430. — ED.

Henry Stockbridge, for the appellant.

Thomas R. Clendinen, for the appellee Lange.

Albert Ritchie, for the appellees, Flynn & Emerich and J. Regester & Sons.[1]

BRENT, J., delivered the opinion of the Court.

The note, about which this case has arisen, is as follows :—

$1100. BALTIMORE, *Feby. 8th*, 1876.

Twelve months after date we promise to pay to the order N. W. Watkins, trustee, eleven hundred dollars with interest, value received.

FLYNN & EMERICH."

The names of "N. W. Watkins, Trustee," and "J. Regester & Sons," are indorsed upon it.

This note was given for the purchase of property sold by N. W. Watkins, as trustee under a decree of the Circuit Court of Baltimore City, and is for one of the deferred payments, as authorized by that decree. At the time of its delivery to the trustee, it was indorsed by J. Regester & Sons as securities for the drawers,— the terms of sale requiring the deferred payments to be secured in that form.

Subsequently N. W. Watkins wrote above the names of J. Regester & Sons the indorsement "N. W. Watkins, Trustee," and applied to the Union Banking Company to buy the note, offering to sell it for 12 per cent off. The Banking Company not being willing to buy it, its cashier offered to sell it for Watkins, and placed it in the hands of a bill broker for that purpose. After getting into the hands of a second bill broker it was taken by him to the Third National Bank, the appellant, and offered to it for sale. The bank bought it from the broker at nine per cent off, and the proceeds seem to have been appropriated by Watkins.

The appellees claim that the bank acquired no right to the note, while it is contended for the bank that the note is embraced in the class of *commercial* paper, and was acquired by it in a usual and proper way.

Without intending to decide upon the right of a national bank to purchase paper, as the question does not necessarily arise in this case, we do not think the note in question is within the class of paper known as commercial paper. Although like it in general form, the fact that it is payable to the order of Watkins, *trustee*, restricts its free circulation, and excepts it from some of the rules governing commercial paper.

No doctrine is better settled, than that a trustee has no power to sell and dispose of trust property for his own use and at his own mere will. One who obtains it from him or through him with actual or constructive notice of the trust, can acquire no title, and it may be recovered by suitable proceedings for the benefit of the *cestui que trust*. If there are circumstances connected with the purchase which reasonably indicate that trust property is being dealt with, they will fix upon the purchaser notice of the trust, and if he fails to make inquiry about the title he is getting, it is his own fault and he must suffer the consequences of his own neglect.

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[1] The arguments of counsel are omitted.—ED.

The general doctrine is stated in 1 Story's Eq. Juris., sec. 400, where it is said: "for whatever is sufficient to put a party upon inquiry, (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons,) is, in equity, held to be good notice to bind him." A large number of authorities is referred to in the note, and it is unnecessary to allude to them more particularly.

In the case of the present note, it cannot be read understandingly without seeing upon its face that it is connected with a trust and is part of a trust fund. It was the duty of the bank, before purchasing it, to have made inquiry into the right of the trustee to dispose of it. But this it wholly failed to do, and as it turns out, he was disposing of the note in fraud of his trust, the bank must suffer the consequences of the risk it assumed.

In the case of Shaw *v.* Spencer, and others,[1] the question is considered, whether the addition of the word *trustee* to the name alone is sufficient to indicate a trust and put a party upon inquiry. That was the case of stock certificates, which were pledged by the holder as collaterals for certain acceptances. The certificates in question were in the name of E. Carter, *trustee*. They were by him indorsed, and one of the questions presented was whether the word *trustee* was sufficient to put the holders upon inquiry, and thereby affect them with notice of the trust. The Court says on page 393, "The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry, for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question, whether the word 'trustee' alone has any significance and does amount to notice of the existence of a trust. But this has heretofore been decided, and is no longer an open question in this commonwealth." And upon the ground that pledgees took the certificates with this notice of the trust, it was held that they could not retain them against the equitable owner, inasmuch as Carter, the trustee, had no authority to use or dispose of them for any such purpose.

The argument, that the bank should not be deprived of its action against J. Regester & Sons, whose indorsement it is claimed guarantees the preceding indorser, would be entitled to weight but for the facts of the case. While the rule is undoubted that a subsequent endorser guarantees the preceding indorsement, it cannot apply to a case where in fact there was no previous indorsement at the time of the alleged second indorsement. The obligations of J. Regester & Sons upon this note were those of original makers, Ives *v.* Bosley,[1] Good *v.* Martin,[2] as is clearly shown by the proof in the case. Their name was placed upon the note as security, and they cannot be held to a contract of guaranty into which they never entered. That parol evidence is admissible to show the character in which they stand relative to this note is settled by the Supreme Court of the United States in the case of Good *v.* Martin, just referred to.

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[1] 100 Mass. 382.

We are therefore very clearly of opinion, that the bank cannot hold Regester & Sons liable as guarantors. When the note is paid, their liability ceases.

We find no error in the decree of the Court below, and it will be affirmed.

Decree affirmed with costs, and case remanded.[3]

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[1] 35 Md. 263.

[2] 95 U. S. 90.

[3] Sturtevant *v.* Jaques, 14 All. 523 *Accord.*

A fortiori one who takes a conveyance from a person whose name is followed by the word "trustee" in the document of title, and with knowledge that he is making the conveyance for his personal advantage, for example, to satisfy or secure his own debt, cannot hold the property against the defrauded *cestui que trust.* Bank of Montreal *v.* Sweeny, 12 App. Cas. 617; Duncan *v.* Jaudon, 15 Wall. 165; Manhattan Bank *v.* Walker, 130 U. S. 267; Shaw *v.* Spencer, 100 Mass. 382; Smith *v.* Burgess, 133 Mass. 511; Payne *v.* First Bank, 43 Mo. Ap. 377, 383; Alexander *v.* Alderson, 7 Baxt. 403.—Ed.

The trustee with a note given to him as "trustee" indorsed it and it came into the hands of the Pf. bank. Held: The bank can't hold the guarantee of the note because "trustee" was a restrictive note.

SECTION I. (*continued*).

(*b*) BY ACT OF THE CESTUI QUE TRUST.

CARPENTER *v.* CARPENTER.

WASBORNE *v.* DOWNES.

IN CHANCERY, BEFORE LORD JEFFREYS, C., FEBRUARY 23, 1686.

[*Reported in* 1 *Vernon*, 440.]

IN these cases it was resolved, that where a common recovery is suffered, or a fine levied by *cestui que trust* in tail, it shall have the same effect, and avail as much in this court, and bind the trust in the same manner as the same would the estate in law in case he had the legal estate in him; and as to a fine, it had never been doubted since the case in the Lord Bridgman's time. And it has been held by some, that even a bargain and sale enrolled by *cestui que trust* of an estate tail should bind the issue, in regard that such a trust is not within the statute *de donis*.[1]

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[1] "The power of an equitable tenant in tail to dispose of the equitable fee simple has been differently viewed at different periods. At common law all inheritable estates were in fee simple, and it was the statute *de donis* (*a*) that first gave rise to entails and expectant remainders. As this statute was long prior to the introduction of uses, had equity followed the analogy of the common law only, a trust limited to A. and the heirs of his body, and in default of issue to B. would have been construed a fee simple conditional, and the remainder over would have been void; but the known legal estates of the day, whether parcel of the common law or ingrafted by statute, were copied without distinction into the system of trusts, and, equitable entails indisputably existing, the question in constant dispute was, by what process they were to be barred. After much fluctuation (*b*) it was finally established by Lord Hardwicke, that as entails with expectant remainders had gained a footing in trusts by analogy to the statute *de donis*, a court of equity was bound to follow the analogy throughout, and therefore that a tenant in tail of a trust could not bar his issue, or the remainderman, except by an assurance analogous to one which would have been a bar had the entail been of the legal estate.

"The doctrines of equity, as finally settled upon this principle, were as follows:—

"1. For a good equitable recovery there must have been an equitable tenant to the *præcipe*, that is, the beneficial owner (*c*) of the first equitable freehold must necessarily have concurred (*d*).

"2. An equitable recovery was a bar to equitable only, and not to legal remainders (*e*).

(*a*) 13 Ed. 1, st. 1, c. 1.

(*b*) See an account of the fluctuation in 3d ed., pp. 601–604.

(*c*) Penny *v.* Allen, 7 De G. M. & G. 425.

(*d*) North *v.* Williams, 2 Ch. Ca. 64, per Lord Nottingham; Highway *v.* Banner, 1 B. C. C. 586; and see Wickham *v.* Wickham, 18 Ves. 418.

(*e*) Philips *v.* Brydges, 3 Ves. 128, per Lord Alvanley; Salvin *v.* Thornton, Amb. 585; s. c. 1 B. C. C. 73, note.

DEARLE *v.* HALL.

IN CHANCERY, BEFORE LORD LYNDHURST, C., DECEMBER 24, 1828.

[*Reported in* 3 *Russell*, 48.]

THE LORD CHANCELLOR.[1] The cases of Dearle *v.* Hall and Loveridge *v.* Cooper were decided by Sir Thomas Plumer; and from his decree there is in each of them an appeal, which stands for judgment. As the two cases depend on the same principle, though the facts are, to a certain degree, different, the better course will be to dispose of both together; and as Dearle *v.* Hall was the first of the two which came before the court below, though it was not argued on appeal till after Loveridge *v.* Cooper had been heard, I shall first direct my attention to the facts on which it depends.

Zachariah Brown was entitled, during his life, to about £93 a year, being the interest arising from a share of the residue of his father's estate, which, in pursuance of the directions in his father's will, had been converted into money, and invested in the names of the executors and trustees. Among those executors and trustees was a solicitor of the name of Unthank, who took the principal share in the management of the trust. Zachariah Brown, being in distress for money, in consideration of a sum of £204, granted to Dearle, one of the plaintiffs in the suit, an annuity of £37 a year, secured by a deed of covenant and a warrant of attorney of the grantor and a surety; and, by way of collateral security, Brown assigned to Dearle all his interest in the yearly sum of £93: but neither Dearle nor Brown gave any notice of this assignment to the trustees under the father's will.

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Shortly afterwards, a similar transaction took place between Brown and the other plaintiff, Sherring, to whom an annuity of £27 a year was granted. The securities were of a similar description; and, on this occasion, as on the former, no notice was given to the trustees.

"3. An equitable recovery was not vitiated by the circumstance that the equitable tenant to the *præcipe* had also the legal freehold (*f*).

"4. An equitable remainder was well barred, though it was vested in a person who had also the legal fee (*g*).

"At the present day, by the operation of the Fines and Recoveries Act (*h*), the equitable tenant in tail may dispose of (*i*) the equitable fee by the same modes of assurance and by the same formalities as if he were tenant in tail of the legal estate." — Lewin, Trusts (9th ed.) 779–80. — ED.

(*f*) Philips *v.* Brydges, 3 Ves. 126, per Lord Alvanley, 2 Ch. Ca. 49; Marwood *v.* Turner, 3 P. W. 171; Goodrick *v.* Brown, 2 Ch. Ca. 49; s. c. Freem. 180.

(*g*) Philips *v.* Brydges, 3 Ves. 120; Robinson *v.* Comyns, Cas. t. Talb. 164, s. c. 1 Atk. 172.

(*h*) 3 & 4 Will. 4, c. 74.

(*i*) A mere declaration of trust is not a disposition within the meaning of the Act, *semble;* Green *v.* Paterson, 32 Ch. Div. 95.

[1] See *supra*, p. 70, n. 1. — ED.

These transactions took place in 1808 and 1809. The annuities were regularly paid till June, 1811; and then, for the first time, default was made in payment.

Notwithstanding this circumstance, Brown, in 1812, publicly advertised for sale his interest in the property under his father's will. Hall, attracted by the advertisement, entered, through his solicitor, Mr. Patten, into a treaty of purchase; and it appears from the correspondence between Mr. Patten and Mr. Unthank that the former exercised due caution in the transaction, and made every proper inquiry concerning the nature of Brown's title, the extent of any incumbrances affecting the property, and all other circumstances of which it was fit that a purchaser should be apprised. No intimation was given to Hall of the existence of any previous assignment; and, his solicitor being satisfied, he advanced his money for the purchase of Brown's interest, and that interest was regularly assigned to him. Mr. Patten requested Unthank to join in the deed; but Mr. Unthank said, "I do not choose to join in the deed; and it is unnecessary for me to do so, because Z. Brown has an absolute right to this property, and may deal with it as he pleases." The first half-year's interest, subject to some deductions, which the trustees were entitled to make, was duly paid to Hall; and, shortly afterwards, Hall for the first time ascertained that the property had been regularly assigned, in 1808 and 1809, to Dearle and to Sherring.

Pl.

Sir Thomas Plumer was of opinion that the plaintiffs had no right to the assistance of a court of equity to enforce their claim to the property as against the defendant Hall, and that, having neglected to give the trustees notice of their assignments, and having enabled Z. Brown to commit this fraud, they could not come into this court to avail themselves of the priority of their assignments in point of time, in order to defeat the right of a person who had acted as Hall had acted, and who, if the prior assignments were to prevail against him, would necessarily sustain a great loss. In that opinion I concur.

It was said that there was no authority for the decision of the Master of the Rolls, — no case in point to support it; and certainly it does not appear that the precise question has ever been determined, or that it has been even brought before the court, except, perhaps, so far as it may have been discussed in an unreported case of Wright *v.* Lord Dorchester. But the case is not new in principle. Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person, who, in fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to choses in action, bonds, &c.; in Ryall *v.* Rowles[1] it is expressly applied to bonds, simple contract debts, and other choses in action. It is true that Ryall *v.* Rowles was a case in bankruptcy; but the Lord Chancellor called to his assistance Lord Chief Justice Lee, Lord Chief Baron Parker, and Mr. Justice Burnett; so that the principle on which the court there acted must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Baron and Mr. Justice Burnett, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application. Lord Chief Baron Parker says, that, on the assignment of a bond debt, the bond should be delivered, and notice given to the debtor; and he adds, that, with respect to simple-contract debts, for which no securities are holden, such as book-debts for instance, notice of the assignment should be given to the debtor, in order to take away from the debtor the right of making payment to the assignor, and to take away from the assignor the power and disposition over the thing assigned. 1 Ves. Sen. 367; 2 Atk. 177. In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. It is upon these grounds that I am disposed to come to the same conclusion with the late Master of the Rolls.

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[1] 1 Ves. Sen. 348; 1 Atk. 165.

I have alluded to a case of Wright *v.* Lord Dorchester, which was cited as an authority in support of the opinion of the Master of the Rolls. In that case, a person of the name of Charles Sturt was entitled to the dividends of certain stock, which stood in the names of Lord Dorchester and another trustee. In 1793 Sturt applied to Messrs. Wright & Co., bankers at Norwich, for an advance of money, and, in consideration of the moneys which they advanced to him, granted to them two annuities, and assigned his interest in the stock as a security for the payment. No notice was given by Messrs. Wright & Co. to the trustees. It would appear that Sturt afterwards applied to one of the defendants, Brown, to purchase his life interest in the stock; Brown then made inquiry of the trustees, and they stated that they had no notice of any incumbrance on the fund: upon this B. completed the purchase, and received the dividends for upwards of six years. Messrs. Wright then filed a bill, and obtained an injunction, restraining the transfer of the fund or the payment of the dividends; but, on the answer of Brown, disclosing the facts with respect to his purchase, Lord Eldon dissolved that injunction. At the same time, however, that he dissolved the injunction, he dissolved it only on condition that Brown should give security to refund the money, if, at the hearing, the court should give judgment in favor of any of the other parties. That case was attended also with this particular circumstance, that the party who pledged the fund stated by his answer that, when he executed the security to Wright & Co., he considered that the pledge was meant to extend only to certain real estates. For these reasons I do not rely on the case of Wright *v.* Lord Dorchester as an authority; I rest on the general principle to which I have referred; and, on that principle, I am of opinion that the plaintiffs are not entitled to come into a court of equity for relief against the defendant Hall. The decree must, therefore, be affirmed, and the deposit paid to Hall.

The case of Loveridge *v.* Cooper, though the circumstances are somewhat different, is the same in principle with Dearle *v.* Hall, and must follow the same decision.[1]

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[1] It will be observed that the second purchaser in the principal case made due inquiry of the trustees as to prior incumbrances, and made his purchase upon their assurance that there were none, — an assurance which was the natural consequence of the first purchaser's failure to notify the trustees of his purchase. The facts and decision were similar in Greening *v.* Beckford, 5 Sim. 195; Bridge *v.* Beadon, 3 Eq. 664; Spain *v.* Hamilton, 1 Wall. 604; Parks *v.* Innes, 33 Barb. 37; Campbell's App., 29 Pa. 401. See also Murdoch *v.* Finney, 21 Mo. 138.

The question is obviously very different where the second purchaser makes no inquiry of the trustee before making the purchase, but rests his claim to priority purely upon the fact that his purchase was first notified to the trustee. It is difficult to see how the second purchaser can found any claim upon the neglect of the first purchaser when his conduct has not been influenced by neglect. It was nevertheless decided by Lord Lyndhurst in Hulton *v.* Sandys, Younge, 602, and by Lords Lyndhurst and Brougham in Foster *v.* Cockerell, 3 Cl. & Fin. 456, 9 Bligh, N. S. 332, that a first purchaser should be postponed to a subsequent purchaser simply because the former did not, and the latter did, give notice of his purchase to the trustee. To the same effect are Timson *v.* Ramsbottom, 2 Keen, 35; Meux *v.* Bell, 1 Hare, 73; Etty *v.* Bridges, 2 Y. & C. C. C. 486; Warburton *v.* Hall, Kay, 470, 478; Elder *v.* McLean, 3 Jur. N. S. 284; Addison *v.* Cox, 8 Ch. 76; Blackwood *v.* London Bank, L. R. 5 P. C. 92; *Re* Freshfield, 11 Ch. D. 198; Saffron Society *v.* Rayner, 14 Ch. D. 406; Low *v.* Bouverie, '91, 3 Ch. 83; English Trust *v.* Brunton, '92, 2 Q. B. 1; Justice *v.* Wynne, 10 Ir. Ch. 489; Bishop *v.* Holcomb, 10 Conn. 444, 446–7; Copeland *v.* Manton, 22 Oh. St. 398, 401; Fisher *v.* Knox, 13 Pa. 622; Wetherell's App. 3 Grant (Pa.), 281, 288; Fraley's App., 76 Pa. 42; Pratt's App. 79 Pa. 378; Weed *v.* Boutelle, 56 Vt. 570. See also People's Bank *v.* Gridley, 91 Ill. 457; Richards *v.* Griggs, 16 Mo. 416 (*semble*); Smith *v.* Sterritt, 24 Mo. 260, 262; Haldeman *v.* Hillsborough Co., 2 Handy, 101, 105; Wallston *v.* Braswell, 1 Jones Eq. (N. C.) 137.

In Meux *v.* Bell, *supra*, Sir James Wigram, V. C., said, pp. 83–87: —

"I believe that, prior to the decision in Mr. Sturt's case, which occurred in 1809 (Wright *v.* Lord Dorchester, 3 Russ. 49, n.), it had never been held that the mere omission of a person having an equitable interest in a fund, the legal property of which was in another, to give notice of that interest would of itself give a puisne incumbrancer the priority; and I think it is apparent, upon the judgment in Evans *v.* Bicknell, 6 Ves. 190, that Lord Eldon at that time did not consider the mere omission to give notice, where the transaction was quite destitute of fraud, would have that effect. Sir Thomas Plumer also, in 1814, in the case of Cooper *v.* Fynmore, 3 Russ. 60, expressed clearly the law of the court to be that the mere omission to give notice would not postpone a prior to a puisne incumbrancer. . . .

"I conceive it to be now clearly decided, by the cases of Dearle *v.* Hall, Loveridge *v.* Cooper, and Foster *v.* Blackstone, 1 Myl. & K. 297; s. c. reported as Foster *v.* Cockerell, 9 Bligh, N. S. 332, that if a *bona fide* incumbrancer upon a fund, the legal interest in which is in a trustee, gives notice of his incumbrance to the trustee, and neither the incumbrancer giving the notice, nor the trustee at the time of such notice being given, has notice of any prior incumbrance affecting the fund, the incumbrancer giving such notice, so long as the circumstances of the case remain unaltered, will be entitled to priority over a prior incumbrancer upon the fund who has omitted or neglected to give notice of his incumbrance, although the puisne incumbrancer may have advanced his money without making any previous inquiries of the trustee . . .

"I think these decisions are founded on principle. The omission of the puisne incumbrancer to make inquiry cannot be material where inquiry into the circumstances of the case could not have led to a knowledge of the prior incumbrance.

"The question is, whether the inquiry, if it had been made, would or would not have informed the puisne incumbrancer of any material fact affecting his interest. If his conduct would have been the same, whether he had made the inquiry or not, the omission of the inquiry cannot be a reason for depriving him of the benefit of his subsequent vigilance.

"The only suggestion which, it appears to me, can be made in answer to this view of the question is, that if the puisne incumbrancer has not made any inquiry, he has not, in point of fact, been deceived or injured by the neglect or omission of the prior incumbrancer. But there is a fallacy in that way of stating the case. If the puisne incumbrancer advances his money *bona fide*, without inquiry, it must be presumed that he would equally have advanced it after inquiry, the result of which would have negatived the existence of any prior incumbrance. The injury he sustains, and which gives him priority, is *ex post facto*. If, after advancing his money, he is informed that there is a prior incumbrance, he will immediately use diligence to get in or secure his property. If, on the other hand, he is not told when he gives the notice that there is a previous incumbrance, he is led to suppose that his security is good; he relies upon it, and he is injured in having placed such reliance upon it if it should appear that there is a prior incumbrance. The notice which, when it is given, has the effect of inquiry is given either at the time the money is advanced or afterwards; and the only distinction between the two cases is a distinction between a party who advances money at the time of taking a security, and a party who takes a security for an antecedent debt. The notice which the puisne incumbrancer gives converts the trustee of the fund into a trustee for the party giving the notice. Dearle *v.* Hall. The credit which the puisne incumbrancer gives to the fund after the notice is as good a consideration as that of any other creditor who takes a security for an antecedent debt, which is clearly sufficient. Plumb *v.* Fluitt, 2 Anst. 432. And the puisne incumbrancer has a better equity than the earlier incumbrancer, because the former by notice to the trustee has perfected his equitable title, which the latter, by omitting or neglecting to give notice, has not done."

An assignee in bankruptcy was, in England, on the principle of Dearle *v.* Hall, postponed to a subsequent particular assignee, if the latter gave notice first. Smith *v.* Smith, Cr. & M. 231; *Re* Atkinson, 2 D. M. & G. 140; *Re* Barr, 4 K. & J. 219; Lloyd *v.* Banks, 3 Ch. 488; *Re* Russell, 15 Eq. 26; Palmer *v.* Locke, 18 Ch. D. 381. The rule was otherwise under the Bankruptcy Act of 1849, § 141. *Re* Coombes, 1 Giff. 91; Bright's Trusts, 13 Ch. D. 413. But see Palmer *v.* Locke, *supra*.

The English rule obtains in Scotland (Redfearn *v.* Ferrier, 1 Dow, 50) and in France. But the opposite rule prevails in Germany (4 Harv. L. Rev. 309, n. 2) and in many states in this country. White *v.* Wiley, 14 Ind. 496; Summers *v.* Hutson, 48 Ind. 228; Thayer *v.* Daniels, 113 Mass. 129 (*semble*); Putnam *v.* Story, 132 Mass. 205; McDonald *v.* Kneeland, 5 Minn. 352 (*semble*); Kennedy *v.* Parke, 17 N. J. Eq. 415; Kamena *v.* Huelbig, 23 N. J. Eq. 78; Muir *v.* Schenck, 3 Hill, 228; Robinson *v.* Weeks, 6 How. Pr. 161; Richardson *v.* Ainsworth, 20 How. Pr. 521; Bush *v.* Lathrop, 22 N. Y. 535, 546 (*semble*); Greentree *v.* Rosenstock, 61 N. Y. 583, 593; Williams *v.* Ingersoll, 89 N. Y. 508, 523; Fairbanks *v.* Sargent, 104 N. Y. 108, 118; Blanchard *v.* Evans, 55 N. Y. Sup'r Ct. 543; (but see Parks *v.* Innes, 33 Barb. 37;) Lindsay *v.* Wilson, 2 Dev. & Bat. Eq. 85; Clarke *v.* Hogeman, 13 W. Va. 718; Tingle *v.* Fisher, 20 W. Va. 497. In Thayer *v.* Daniels, *supra*, the court speaking through Devens, J., said, p. 131: "The rule in England would seem to be that, as between successive purchasers of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent purchaser. . . . Such, however, has not been the rule adopted in this State, where it is well settled that the assignment of a chose in action is complete upon the mutual assent of assignor and assignee, and does not gain additional validity as against third persons by notice to the debtor."

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It has been decided that the first assignee of a policy of insurance to whom the policy is delivered will prevail against a subsequent assignee who does not get the policy, even though the insurance company is notified of the second assignment first. Spencer *v.* Clarke, 9 Ch. D. 137; West of England Bank, 51 L. J. Ch. 199; (but see Le Fenore *v.* Sullivan, 10 Moo. P. C. 1). And, it is conceived, the principle of this decision would apply to the assignment of any specialty. Société Général, 11 App. Cas. 20 (*semble*); Kamena *v.* Huelbig, 23 N. J. Eq. 78; Maybin *v.* Hall, 4 Rich. Eq. 105; Strange *v.* Houston Co., 53 Tex. 162. But see, *contra*, Fraley's App., 76 Pa. 42; Pratt's App., 77 Pa. 378.

Whatever view may be entertained as to the English doctrine which prefers the assignee who first gives notice, the second assignee is in several contingencies clearly entitled to supplant the first assignee. *E. g.* (1) if, acting in good faith, he obtains payment of the claim assigned; Judson *v.* Corcoran, 17 How. 612; Bridge *v.* Conn. Co., 152 Mass. 343; Bentley *v.* Root, 5 Paige, 632, 640; or (2) if he reduces his claim to a judgment in his own name; Judson *v.* Corcoran, 17 How. 612; Mercantile Co. *v.* Corcoran, 1 Gray, 75; or (3) if he effects a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to himself, N. Y. Co. *v.* Schuyler, 34 N. Y. 30, 80; Strange *v.* Houston Co., 53 Tex. 162; or (4) if he obtains the document containing the obligation when the latter is in the form of a specialty; *Re* Gillespie, 15 Fed. Rep. 734; Bridge *v.* Conn. Co., 152 Mass. 343; Fisher *v.* Knox, 13 Pa. 622. In all these cases, having obtained a legal right in good faith and for value, the prior assignee cannot properly deprive him of this legal right.

32 H.L.R. 336, 338, 7. (Ca.)

NOTICE (where the English rule prevails).

The prior notice by the later assignee is none the less effectual, although at the time of giving it he had become aware of the earlier assignment. Mutual Life Society *v.* Langley, 32 Ch. Div. 460. But priority of notice will not, of course, help an assignee who took his assignment with knowledge of the earlier transfer to another. Notice given to a trustee before his appointment is of no effect. Roxburghe *v.* Cox, 17 Ch. D. 527. But notice need not come from the assignee. Knowledge acquired by the trustee or obligor from a third person, if of a character to influence the conduct of a reasonable man, is effectual. Lloyd *v.* Banks, 3 Ch. 488, 490; *Ex parte* Stewart, 34 L. J. Bank. 6; Barron *v.* Porter, 44 Vt. 587; (but see Webster *v.* Moranville, 30 Vt. 701; Hutchins *v.* Wait, 35 Vt. 360). If notices by successive assignees are simultaneous, the prior assignee prevails. Johnstown *v.* Cox, 19 Ch. Div. 17, 16 Ch. D. 571. The rule is the same where the successive assignees are volunteers. Sloper *v.* Cottrell, 6 E. & B. 497; Justice *v.* Wynne, 12 Ir. Ch. R. 289. If the assignor is himself one of the trustees of the fund assigned, his knowledge is not equivalent to notice. Brown *v.* Savage, 4 Drew. 635. But if an assignee is one of the trustees, his knowledge is equivalent to notice. Willes *v.* Greenhill, 29 Beav. 376; *Ex parte* Garrard, 5 Ch. Div. 61; *Re* Wyatt, '92, 1 Ch. 188. If the prior assignee cannot give notice, because he is ignorant of the trustee's existence, he will not be postponed to a second assignee who does give notice. Feltham *v.* Clark, 1 De G. & Sm. 307. If a contract claim is held in trust, notice should be given to the trustee and not to the debtor. Gardner *v.* Lachlan, 8 Sim. 123. Mailing a notice has been thought sufficient to protect the interest of the ~~several~~ assigns. Belcher *v.* Bellamy, 2 Ex. 303; *Re* Hickey, 10 Ir. R. Eq. 117; Daniel *v.* Freeman, 11 Ir. R. Eq. 233. — ED.

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LEE v. HOWLETT.

In Chancery, before Sir W. Page Wood, V.C., March 11, 1856.

[*Reported in 2 Kay & Johnson*, 531.]

Timothy Tripp Lee, by his will, dated the 30th of June, 1840 amongst other devises, gave to his wife Elizabeth (since deceased) certain freehold and leasehold hereditaments, known as Dell's Manor farm, to hold the same for her life; and, after her decease, the testator directed that the same should be sold by public auction, and that the money should be equally divided among his surviving children; and the testator devised and bequeathed the residue of his property, as well funded or otherwise, to his wife for her life, and after her death, to be equally divided amongst his surviving children. And he appointed his wife, and his sons, the plaintiff Timothy Lee and Cornelius Lee (since deceased), executrix and executors of his will.

The testator died on the 29th of December, 1840, leaving his widow and eleven children surviving him.

By a deed of arrangement, dated in 1841, and executed by all the children (except one who had died), it was mutually agreed that all the property devised by the testator amongst his surviving children should be divided and disposed of, subject to the life interests therein, in like manner and shares as if the same had been given, subject as aforesaid, amongst all his children who should survive him, equally as tenants in common, so that one equal eleventh part or share thereof should go and be paid and payable to each and every, or to the executors, administrators, or assigns of each and every, the said, &c. (the children), notwithstanding any or either of them, the said, &c., should die before the property should become divisible or payable, and the executors or administrators of any of them who might so die should receive his or her eleventh share, and apply the same as his or her personal estate, &c.

Charles Lee, one of the children, by indenture, dated the 24th of March, 1842, mortgaged his reversionary share and interest of all the property under the will and deed of arrangement to one Simon Main to secure £450, and interest, of which indenture the plaintiff Timothy Lee had not received notice till the year 1848. 1

By indenture, dated February 14, 1844, Charles Lee again assigned his share to a Miss Lys to secure £250, and interest; of which indenture Miss Lys gave notice to the plaintiff in May, 1844. 2

At the time of the mortgage to her, Miss Lys had no notice of the prior mortgage.

By indenture, dated the 1st of October, 1846, Charles Lee again assigned his share to one Gaches, to secure a sum of £300 and interest; of which indenture Gaches gave notice to the plaintiff in the same month of October, 1846. 3

The testator's widow having died in 1854, this suit was instituted by the plaintiff for the administration of the real estate; a previous suit of "Lys *v.* Lee" had been instituted by Miss Lys to realize her security out of the personal estate, which, however, was wholly exhausted, leaving nothing but the real estate and its produce for the incumbrancers to look to.

A decree for sale had been made in this suit (Lee *v.* Howlett), and the usual inquiry directed as to incumbrances on the shares of the children.

Pursuant to the decree Dell's Manor farm had been sold for £3,400, and the residuary estate for £500. The chief clerk certified as to the incumbrances, and, amongst others, to those on Charles Lee's share as above; the result of his finding being that the several mortgagees, Vaughan (in whom Simon Main's mortgage had become vested), Miss Lys, and Gaches, were entitled according to the dates of their incumbrances. But it was arranged that the question of priority, with reference to the dates of the several notices given to the plaintiff, should be argued before the court on the hearing for further consideration.

The cause now came on to be so heard.

Mr. Rolt, Q. C., and *Mr. Speed*, for the plaintiff.

Mr. Daniel, Q. C., and *Mr. W. P. Murray*, for Miss Lys.

Mr. Bilton, for other parties.

Mr. Cadman Jones, for Vaughan, the first mortgagee.[1]

VICE CHANCELLOR SIR W. PAGE WOOD. I am of opinion that as to that portion of the property which was ordered to be sold, I am bound to hold, on the principle of Foster *v.* Cockerell, Dearle *v.* Hall, and that class of cases, that the incumbrancer who first gave notice of his incumbrance must prevail over the others. The principle does not depend simply on a question of *mala fides;* but the rule is, that the party who first makes himself master of a chose in action, by giving notice, to prevent its being handed over by the person in whose hands it is to any other claimant, — in other words, who first devests the title of the owner by giving notice to the person through whom the owner must derive the fund, — arrests that fund, and acquires the property for himself. Whether the fund be a trust fund held by A. in trust for B., or a debt payable by A. to B., if B. assigns, and his assign requires A. to pay the money over to him, that gives him priority over a previous assign of B., who has not given such notice.

It is decided that this doctrine does not apply to real estate;[2] and in Wiltshire *v.* Rabbits[3] the late Vice Chancellor of England considered that the doctrine was not applicable to an assignment of an equitable interest in a chattel real. In this case, part of the property is directed to be sold, without saying by whom. The sale must be by the heir or executors. Here, the same person fills both those characters, and the property must therefore pass through him. It must be converted into money, and none of the legatees could have reached that money except through him; and they could never have had the property in the shape of land, but only as money. Then, the executor being bound to pay the shares in this manner, the fact that, at the time when this security was given, the period for the sale had not arrived, is not material.[1] Whenever the property was sold and the money paid to the executor, he would hold part of it for Charles Lee, or for the person who had obtained an assignment of his share from Charles Lee. Here, Miss Lys first gave to the executor notice of the assignment in her favor, and therefore she has priority over all other assigns of Charles Lee's share as to this part of the mortgaged property.

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[1] The arguments of counsel are omitted. — ED.

[2] Bugden *v.* Bignold, 2 Y. & C. C. C. 379, 392; Malcolm *v.* Charlesworth, 1 Keen, 63; Jones *v.* Jones, 8 Sim. 633; Wilmot *v.* Pike, 5 Hare, 14; Rooper *v.* Harrison, 2 K. & J. 86, 103; Phipps *v.* Lovegrove, 16 Eq. 90, 91; McCreight *v.* Foster, 5 Ch. 604; Union Bank *v.* Kent, 39 Ch. Div. 238; Humber *v.* Richards, 45 Ch. D. 589; Rochard *v.* Fulton, 7 Ir. Eq. R. 131; *Re* Burke, L. R. 9 Ir. 52; Parks *v.* Innes, 33 Barb. 37 (*semble*) *Accord.* — ED.

[3] 14 Sim. 76.

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As regards the residuary real estate, there is no direction in the will to sell that. It was devised to the testator's wife, for life, and after her death to her children. That would carry the fee-simple, and the children would not be obliged to take their shares from the hands of any third person, and although by the deed of arrangement they seem to have treated it as personal estate, it was in their own hands; and therefore there can be no question of notice as to this property, but it must go to the incumbrancers according to the order in time in which they obtained their securities.

PHILLIPS *v.* PHILLIPS.

IN CHANCERY, BEFORE LORD WESTBURY, C., DECEMBER 9, 10, 1861.

[*Reported in* 4 *De Gex, Fisher, & Jones*, 208.]

THE LORD CHANCELLOR.[2] When I reserved my judgment at the conclusion of the argument in this case, it was rather out of respect to that argument than from a feeling of any difficulty with regard to the question that had been so strenuously contested before me.

The case is a very simple one. The plaintiff claims as the grantee of an annuity granted by a deed dated in the month of February, 1820, to issue out of certain lands in the county of Monmouth, secured by powers of distress and entry. The annuity or rent-charge was not to arise until the death of one Rebecca Phillips, who died in the month of December, 1839, and the first payment of the annuity became due on the 8th of March, 1840. The case was argued on both sides on the admitted basis that the legal estate was outstanding in certain incumbrancers, and is still outstanding. Subject to the annuity the grantor was entitled in fee-simple in equity. In February, 1821, the grantor intermarried with one Mary Phillips. On the occasion of that marriage, a settlement, dated in February, 1821, was executed, and under this deed the defendants claim; and claim, therefore, as purchasers for a valuable consideration. No payment has ever been made in respect of the annuity.

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[1] Foster *v.* Cockerell, 3 Cl. & F. 456; Consol. Co. *v.* Riley, 5 Jur. N. S. 1283; *Re* Hughes's Trusts, 2 H. & M. 89; *Re* Wyatt, '92, 1 Ch. 188; Daneel *v.* Frohman, 11 Ir. R. Eq. 233; Putnam *v.* Story, 132 Mass. 205 *Accord.* — ED.

[2] See *supra*, p. 70, n. 1. — ED.

The bill was filed within twenty years, and seeks the ordinary relief applicable to the case. The defendants by their answer insist that the deed was voluntary, and therefore void under the Statute of Elizabeth, as against them in their character of purchasers for valuable consideration, and they also insist upon the Statute of Limitations. But in the answer the defence of purchase for valuable consideration without notice is not attempted to be raised.

At the hearing, an affidavit of Mary Phillips and another person was produced, denying the fact of notice of the annuity at the time of the grant and at the time of the creation of the marriage settlement, and the contention at the bar was that the defence of purchase for valuable consideration without notice was available for the defendants, under these circumstances, and ought to be allowed as a bar to the claim by the court. The Vice Chancellor in his judgment refused to admit the defence of purchase for valuable consideration without notice, and I entirely agree with him in the conclusion that such a defence requires to be pleaded by the answer, more specially where an answer has been put in.

But I do not mean to rest my decision upon that particular ground because I have permitted the argument to proceed with reference to the general proposition, which was maintained before me with great energy and learning, viz. that the doctrine of a court of equity was this, that it would give no relief whatever to any claimant against a purchaser for valuable consideration without notice. It was urged upon me that authority to this effect was to be found in some recent decisions of this court, and particularly in the case decided at the Rolls of the Attorney-General v. Wilkins.[1]

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I undoubtedly was struck with the novelty and extent of the doctrine that was thus advanced, and in order to deal with the argument it becomes necessary to revert to elementary principles. I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seized of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a pur-

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[1] 17 Beav. 285.

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chaser, he can grant to the purchaser that which he has, viz. the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, "*Qui prior est tempore potior est jure.*" The first grantee is *potior;* that is, *potentior.* He has a better and superior — because a prior — equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time when they took their securities and paid their money had notice of the first incumbrance or not. These elementary rules are recognized in the case of Brace *v.* Duchess of Marlborough,[1] and they are further illustrated by the familiar doctrine of the court as to tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer, at the time of his incumbrance and payment of his money, had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage which he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title; for if the first mortgagee has not the legal title, the third does not by the transfer obtain the legal title, and the third mortgagee by payment off of the first acquires no priority over the second. Now, the defence of a purchaser for valuable consideration is the creature of a court of equity, and it can never be used in a manner at variance with the elementary rules which have already been stated. It seems at first to have been used as a shield against the claim in equity of persons having a legal title. Bassett *v.* Nosworthy[2] is, if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance, together with the maxim which I have referred to, probably gave rise to the notion that this defence was good only against the legal title. But there appear to be three cases in which the use of this defence is most familiar.

First, where an application is made to an auxiliary jurisdiction of the court by the possessor of a legal title, as by an heir-at-law (which was the case in Bassett *v.* Nosworthy),[2] or by a tenant for life for the delivery of title-deeds (which was the case of Wallwyn *v.* Lee),[3] and the defendant pleads that he is a *bona fide* purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is that as against a purchaser for valuable consideration without notice the court gives no assistance; that is, no assistance to the legal title. But this rule does not apply where the court exercises a legal jurisdiction concurrently with courts of law. Thus it was decided by Lord Thurlow in Williams *v.* Lambe,[1] that the defence could not be pleaded to a bill for dower; and by Sir J. Leach, in Collins *v.* Archer,[2] that it was no answer to a bill for tithes. In those cases the court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief.

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[1] 2 P. Wms. 491.

[2] Finch, 102; s. c. 2 White & T. L. C. 1.

[3] 9 Ves. 24.

The second class of cases is the ordinary one of several purchasers or incumbrancers each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a court of equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice; for the principle is, that a court of equity will not disarm a purchaser, that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*.

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Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate, — as, for example, an equity to set aside a deed for fraud, or to correct it for mistake, — and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere.[3]

Now these are the three cases in which the defence in question is most commonly found. None of them involve the case that is now before me.

It was indeed said at the bar that the defendants, being in possession, had a legal advantage in respect of the possession, of which they ought not to be deprived. But that is to confound the subject of adjudication with the means of determining it. The possession is the thing which is the subject of controversy, and is to be awarded by the court to one or to the other. But the subject of controversy, and the means of determining the right to that subject are perfectly different. The argument, in fact, amounts to this: "I ought not to be deprived of possession, because I have possession." The purchaser will not be deprived of anything that gives him a legal right to the possession, but the possession itself must not be confounded with the right to it.

The case, therefore, that I have to decide is the ordinary case of a person claiming under an innocent equitable conveyance that interest which existed in the grantor at the time when that conveyance was made. But, as I have already said, that interest was diminished by the estate that had been previously granted to the annuitant, and as there was no ground for pretending that the deed creating the annuity was a voluntary deed, so there is no ground whatever for contending that the estate of the person taking under the subsequent marriage settlement is not to be treated by this court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed and excepted out of the operation of the subsequent instrument.

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[1] 3 B. C. C. 264.

[2] 1 Russ. & Mylne, 284.

[3] As to the alleged difference between an equity and an equitable estate, see 1 Harvard Law Rev. 2. — ED.

I have no difficulty, therefore, in holding that the plea of purchase for valuable consideration is upon principle not at all applicable to the case before me, even if I could take notice of it as having been rightly and regularly raised.

We next come to examine the authorities upon which the defence relies. Now, undoubtedly, I cannot assent to some observations which I find attributed to the Master of the Rolls in the report of the case of the Attorney-General *v.* Wilkins;[1] but to the decision of that case, as explained by his Honor in the subsequent case of Colyer *v.* Finch,[2] I see no reasonable objection, and the principles that I have here been referring to are fully explained and acted on by the Master of the Rolls in the case of Colyer *v.* Finch.[2] It is impossible, therefore, to suppose that he intended to lay down anything in the case of the Attorney-General *v.* Wilkins,[1] which is at variance with the ordinary rules of the court as I have already explained them, or which could give countenance to the argument that has been raised before me at the bar.

I have consequently no difficulty in holding that the decree of his Honor the Vice Chancellor is right upon the grounds on which he placed it in the court below, and that also it would have been right if he had sonsidered the grounds which have been urged before me in support of this petition of rehearing. I therefore affirm the decree and dismiss the petition of rehearing; but inasmuch as the plaintiff sues in *forma pauperis*, of course it must be dismissed without costs.[3]

NEWMAN *v.* NEWMAN.

IN CHANCERY, BEFORE NORTH, J., JANUARY 12, 13, 14, 15, 19, 1885.

[*Reported in* 28 *Chancery Division*, 674.]

IN the year 1869 a lease of the New Dynevor Colliery was made to certain persons, one being Michael Lewis Brown, who took three-eighths of the colliery, as to one moiety thereof for himself, and as to the other moiety in trust for Edwin Newman.

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[1] 17 Beav. 285.

[2] 19 Beav. 500.

[3] There is believed to be a strong analogy between an equitable rent charge and a partial assignment of a *chose in action*. Accordingly, if a partial assignor subsequently purports to sell the entire claim to a *bona fide* purchaser, the latter, as in the principal case, will be postponed to the prior incumbrancer. This, it is submitted, is the true ground, though not ostensible ground, of the decision in Fairbanks *v.* Sargent, 104 N. Y. 108, 117 N. Y. 320. — ED.

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In 1871 Brown had made large advances for the colliery and to Edwin Newman, and pressed for payment. By a deed made in July, 1871, after reciting that Edwin Newman had a policy on his life for £3,000, and had assigned that and also his share in the colliery to his wife's mother, Sophie Storie Armstrong, by way of security for £5,700, it was witnessed that Mrs. Armstrong and Edwin Newman assigned the policy and Edwin Newman's one moiety of three-eighths of the colliery to Brown by way of security for the repayment to him of £3,180, and subject thereto for Mrs. Armstrong.

Edwin Newman was dead, and a sum representing the £3,000 due under the policy had been paid into Court. Brown had sold the shares in the colliery, and had a balance of £850 arising from the sale.

This action was brought by Violet Ida Newman, one of the children of Edwin Newman, against Brown and against the administrator of Mrs. Armstrong (who was dead), claiming as against Brown that a certain sum of £5,700 had priority over his charge on the colliery shares and on the policy money; and that he might be declared a trustee of the colliery shares as to the £5,700. The plaintiff's case was as follows:—

By an indenture of settlement dated the 24th of September, 1856, made on the marriage of Edwin Newman with Mrs. Armstrong's daughter, certain funds were assigned to three trustees on the usual trusts for Mrs. Newman, Edwin Newman, and their children, of whom the plaintiff, Violet Ida Newman, was one.

The other trustees died or retired, and in 1866 Mrs. Armstrong was appointed sole trustee. The dealings as to the trust funds between Mrs. Armstrong and Edwin Newman were very complicated and obscure, but it was clear that Edwin Newman had borrowed more than £5,000 of the trust money from Mrs. Armstrong; and, according to the case of the plaintiff, the £5,700 due by Edwin Newman to Mrs. Armstrong, as stated in the mortgage to Brown, was the fund so borrowed and was subject to the trusts of the settlement; and then the shares in the colliery and the policy had been assigned by Edwin Newman to Mrs. Armstrong by way of security for the trust money which had been advanced by her to Edwin Newman.

Brown alleged that he took his charge without any notice whatever of the settlement, and that he thought and still believed that the £5,700 was the money of Mrs. Armstrong.

Barber, Q. C., and *R. C. Dobbs*, for the plaintiff.

W. Pearson, Q. C., and *B. B. Rogers*, for Brown.

Lemon, and *Hatfield Green*, for other defendants.

NORTH, J., after fully stating the complicated facts, and referring to the obscurity of the transactions, continued:—

Now out of that state of facts the questions between the parties arise in this way. First, as regards the shares in the colliery, and, secondly, as regards the policy moneys, which stand in rather different posi-

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but if B [illegible] Pltff claims tht a mny t wh B gv a secty to C [illegible] mny. A [illegible]
3 [illegible] but [illegible], a mny [illegible] Co.

tions.[1] As to the colliery, the question is whether, assuming the £5,700 to have been trust money, Brown's charge is prior or subsequent to the charge of the £5,700. It is quite clear that Brown had no notice whatever of the money being trust money, if in fact it was. [His Lordship then referred to some of the evidence.] Therefore it comes to this. Brown has got the legal estate, and he had it prior to the charge in 1871. He took that security without notice of any prior charge. 71 But then it is said that there was already a charge in favor of Mrs. Armstrong, and that the plaintiff for whom she was trustee and who claims under her has a charge prior to Brown's. Brown's answer to that is: "I have the legal estate; and I had no notice of any trust actual or constructive. There was nothing whatever to put me upon any inquiry. I dealt with persons who represented this property to be their own, and I had no notice of any sort that either of them was a trustee. I have clearly got a good charge and I have the legal estate. I cannot now be told that my interest is to be postponed to the plaintiff's when I had the legal estate and dealt with the only persons I knew or could know." Pr It appears to me that even if the £5,700 is trust money he is entitled to succeed upon that defence.

The cases in which a second equitable incumbrancer without notice has got in the legal estate and has protected himself are very numerous and well-known. But it is said that the present does not come within these cases, because Brown was the trustee of the leasehold interest, and held it in trust for the real owners whoever they were; and that he cannot be heard to say that his own charge which was subsequent in date ought to have priority over the charges of the persons for whom he is trustee. But he is trustee without any notice whatever of any charge, and he dealt with persons who were treated throughout as the only persons interested in the estate. Is there anything to prevent a trustee from dealing with his only known *cestui que trust*, and then taking advantage of the legal estate which he does not get in afterwards but has already.

There are two cases to which I will refer. One is Phipps *v.* Lovegrove.[2] The Lord Justice James, sitting for Vice-Chancellor Wickens, says in his judgment:[3] "The trustees at the request and by the direction of the only *cestuis que trust* of whom they had any notice or knowledge whatever, dealt with the funds; and it appears to me, upon more than one ground, that any person claiming under the same *cestuis que trust* has no right to make any claim against them. It is a rule and principle of this Court, and of every Court, I believe, that where there is a *chose in action*, whether it is a debt or an obligation, or a trust fund, and it is assigned, the person who holds that debt or obligation, or has undertaken to hold the trust fund, has, as against the assignee, exactly the same equities that he would have as against the assignor. Down to the date at which the notice of assignment was given to the trustees, the trustees were at liberty to deal with the fund, and to have equities created in their favor by the *cestuis que trust*, until they received notice that some other person had come in and displaced those equities. An insurance office might lend money upon a policy of insurance to a person who had insured his life, notwithstanding any previous assignment by him of the policy, of which no notice had been given to them. Trustees who have got a legal estate, or an estate of any kind, either money or land, may lend money to the *cestuis que trust*, and get a beneficial interest in the trust property, if they have no notice that there have been any prior incumbrances. They have got the legal estate and they have got the legal right; they have therefore got, in respect of the charge created in their favor, before they have got any notice of anything else, a right to retain that which the law has given them." Now it is admitted that this is quite in point, but it was said that the passage referring to trustees who have got the legal estate is merely an illustration by way of *dictum*, and is not necessary for the decision of the case. To a certain extent that is true, but it is an illustration in point and bears upon what the learned judge decided, and it shows his opinion upon the matter to be that a trustee who had got the legal estate could deal with the *cestui que trust* by buying his interest or making an advance, and could maintain that charge against a prior incumbrancer on the ground that he held the legal estate, provided always that it was without notice.

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[1] So much of the case as relates to the policy moneys is omitted, as well as the arguments of counsel. — Ed.

[2] Law Rep. 16 Eq. 80.

[3] Law Rep. 16 Eq. 88.

The case of Browne *v.* Savage[1] seems to me very much in point, though it does not refer to the legal estate. There Kindersley, V. C., decided that an assignment by one trustee to another gave that trustee notice, and that at any rate during the life of that trustee the notice so given was all that was necessary, and so it has been held in subsequent cases, of which Willes *v.* Greenhill[2] is one. The fact that the trustee to whom the assignment was made gave no notice till afterwards to the third trustee was immaterial. It was held that the trustee was competent to deal with the *cestui que trust*, and to get a good charge in priority to other charges of which he had no notice, though he was trustee of the fund for the owners of it, including persons in favor of whom charges had been made of which notice had not been given.

Some little doubt has been thrown upon that case by the remark of Lord St. Leonards in a note to Vendors and Purchasers.[3] He says: "There is a mistake in the dates; they do not agree with the priorities ordered." But I have looked very carefully at the case, and it seems to me that the note by Lord St. Leonards is inaccurate, and he seems to have confused the notices, and to have thought that the notice given by the second trustee to the third on the 30th of July, 1858, was the ruling notice, whereas the true ruling notice as regards the mortgage of 1858 by Savage to the second trustee was not of that date, but was the assignment itself, which was dated the 29th of March, 1858. It seems to me that the decision of Kindersley, V. C., was quite accurate, and that the priorities were given according to what he decided to be the right order of the notices. It appears to me, therefore, upon these authorities, that the trustee is entitled to hold the leasehold interest as security for what is due to him in priority to any claim by any *cestui que trust*, even assuming the £5,700 to have been trust money.[1]

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[1] 4 Drew. 635.

[2] 29 Beav. 376.

[3] 14th ed. p. 379.

IN RE COLEMAN.

HENRY *v.* STRONG.

IN THE COURT OF APPEAL, AUGUST 10, 1888.

[*Reported in* 39 *Chancery Division*, 443.]

ALFRED COLEMAN, by will dated the 5th of August, 1875, gave his residuary estate to trustees upon trust to pay the income to his wife during widowhood, "but in the event of her death or second marriage then I direct my said trustees to apply such rents, interest, dividends, and annual proceeds in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years, and on his or her attaining that age, then I direct my said trustees to distribute the whole of my said estate between my said children in such shares and proportions as my said wife, if then living, shall by deed or will appoint, or if dead then equally between all my children then living, the shares of any females to be for their sole and separate use, and free from the control, debts, or engagements of any husband."

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[1] It is on the same principle that where a first mortgage is given to secure present and future advances, the mortgagee, who makes subsequent advances in ignorance of an intervening second mortgage, is entitled to repayment of the subsequent advances in priority to the intervening mortgagee. Collet *v.* De Gols, Talbot, 65; Barnett *v.* Weston, 12 Ves. 130; Wilmot *v.* Pike, 5 Hare, 14; Hopkinson *v.* Rolt, 9 H. L. C. 514 (*semble*); Young *v.* Young, L. R. 3 Eq. 801; Liverpool Co. *v.* Wilson, 7 Ch. 507; Bradford Co. *v.* Briggs, 12 App. Cas. 29, 29 Ch. D. 149; Union Bank *v.* Royal Bank, 12 App. Cas. 53; Shirras *v.* Caig, 7 Cranch, 34; *Re* Haake, 7 N. B. R. 61; 2 Sawy. C. C. 23, S. C.; Tapia *v.* Demantini, 77 Cal. 383; Boswell *v.* Goodwin, 31 Conn. 74; Frye *v.* Illinois Bank, 11 Ill. 367 (*semble*); Brinkmeyer *v.* Browneller, 55 Ind. 487 (*semble*); Nelson *v.* Boyce, 7 J. J. Marsh. 401; Wilson *v.* Russell, 13 Md. 494 (*semble*); Ladue *v.* Detroit Co., 13 Mich. 380 (*semble*); Ward *v.* Cooke, 17 N. J. Eq. 93; Truscott *v.* King, 6 Barb. 346; 2 Seld. 166, S. C.; Ackerman *v.* Hunsicker, 85 N. Y. 43; Farr *v.* Nichols, 132 N. Y. 327; Spader *v.* Lawler, 17 Ohio, 371 (*semble*); Bank of Montgomery Co.'s Appeal, 36 Pa. 170; McDaniels *v.* Colvin, 16 Vt. 300.

The rule is the same when an equitable interest is mortgaged to secure present and future advances, and a second mortgage is given after the first, but before the subsequent advance. Calisher *v.* Forbes, 7 Ch. 109; London Co. *v.* Ratcliffe, 6 App. Cas. 722 (*semble*); *Re* McNamara, L. R. 13 Ir. 158.

One who takes negotiable paper before maturity as collateral security and makes further advances after the maturity of the bill, may hold the paper for all his advances as against equitable defences. Spering's App., 10 Barr, 235; Bancroft *v.* McKnight, 11 Rich. 663. — ED.

The testator died on the 17th of May, 1880, leaving a wife and four children. The widow died in May, 1884, without exercising the power of appointment. At her death two of the children, of whom John Soy Coleman was the eldest, had attained twenty-one. The other two were minors at the time of these proceedings, the youngest being in the seventh year of his age at the widow's death.

On the 13th of April, 1886, John Soy Coleman, who was resident in Australia, sold and assigned absolutely to David Henry, "all and singular the part or share, and all the income, property, moneys, securities, estates, and interests to which the said J. S. Coleman was or is entitled to, or which he may at any time hereafter become entitled to under the said will of his said father, the said Alfred Coleman, deceased, or in any other manner howsoever by reason of his decease, and all stocks, funds, and securities in or upon which the same, or any part thereof, were or are, or is now, or shall or may at any time hereafter be invested, and all interest to become due in respect thereof."

From the death of the widow the trustees had applied the income in equal shares for the benefit of the four children paying one-fourth directly to each of the two adults. In June, 1886, formal notice of the above assignment was given to the trustees, with a request by D. Henry and by J. S. Coleman that the payments might thenceforth be made to Henry. The trustees were advised not to make any further payments in respect of J. S. Coleman without the sanction of the court. They continued to apply three-fourths of the income for the benefit of the children other than J. S. Coleman, and kept the remaining fourth in hand.

In March, 1887, Henry took out an originating summons to have it decided whether the gift of capital to the children was contingent on their being alive at the period of distribution, and if so, whether J. S. Coleman had an interest in the income which would pass by his assignment.

The summons was heard before Mr. Justice North on the 8th of February, 1888.

The order as drawn up declared that no child of the testator is entitled, prior to the time when the youngest of his children attains the age of twenty-one years, to payment of, or has a transmissible interest in, one-fourth share or any part of the income of the residuary estate of the said A. Coleman, or the proceeds thereof, and that the plaintiff has no claim, present or future, prior to that event, against the trustees of the will of the said A. Coleman for income, and that the trustees are entitled to employ the income for the benefit and main-

Teste thd dece propy sh e yngst been 21 & be dvd eqy amg e childn. 1 o e childn been 21 & asgnd h shr & Pf. Held: e older childn h n assignbl int. b/f e yngst w 21, tenance of the children, including the said J. S. Coleman, at their absolute discretion.

Henry appealed from this decision. The appeal was heard on the 10th of August, 1888.

Everitt, Q. C., and *Clayton*, for the appellant.

Decimus Sturges, for the infant children.

Page, for the trustees.[1]

Cotton, L. J. This is an appeal from an order of Mr. Justice North, and we think that some alteration in its terms is requisite. The contention of the appellant was that each of the four children took a vested interest in one-fourth of the income till the youngest child attained twenty-one. I am of opinion that no child has a right to any share of the income. The trustees have a discretion to apply the income for the maintenance of the children in such manner as they think fit. This excludes the notion of the children being entitled to aliquot shares. I will assume, though I do not decide, that the trustees have no power to exclude a child, but I am clearly of opinion that under this power they could make unequal allowances for the benefit of the children, and might allow only half-a-crown to one of them. This is not a void attempt to make shares given to children inalienable, so as to exclude their creditors, it is a power to the trustees to give to each child what they think fit, and if they cannot altogether exclude a child who has become bankrupt or assigned his interest, they can allot to him as little as they think desirable. Then does the assignment include every benefit which the trustees give to J. S. Coleman out of the income? I think not. If the trustees were to pay an hotel-keeper to give him a dinner he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy. But if they pay or deliver money or goods to him, or appropriate money or goods to be paid or delivered to him, the money or goods would pass by the assignment. I think that the declaration proposed by Lord Justice Fry is right, and I am of opinion that the trustees will not be at liberty to send over money or goods to J. S. Coleman.

The strongest cases referred to by the counsel of the appellant were Green *v.* Spicer,[2] and Younghusband *v.* Gisborne,[3] but in those cases the income was directed to be applied solely for the benefit of the insolvent, which made it his property, and an attempt was then made to prevent its being dealt with as his property if he became bankrupt. Here no property is given to J. S. Coleman, but only a discretion to the trustees to apply such part as they think fit of the income for his benefit. This case, therefore, does not come within the principle of those cases, and I think that the declaration proposed by the Lord Justice Fry is right.[4]

Fry and **Lopes**, L.JJ., concurred.

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[1] The arguments of counsel are omitted. — Ed.

[2] 1 Russ. & My. 395.

[3] 1 Coll. 400.

[4] *Re* Neil, 62 L. T. Rep. 649 *Accord.* — Ed.

HENRY BELKNAP AND OTHERS *v.* EDWARD BELKNAP AND OTHERS.

THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1862.

[*Reported in* 5 *Allen*, 468.]

BILL IN EQUITY, praying for the removal of Edward Belknap, as trustee under the will of his father, and that an assignment by him of his interest in the trust fund might be declared void, and for other relief.

At the hearing in this court, before Hoar, J., it appeared that John Belknap died in 1856, and disposed of the residue of his estate as follows: —

"All the rest and residue of my estate, real, personal, and mixed, not herein before devised and bequeathed, I hereby give, devise, and bequeath, in trust, to my sons Edward Belknap and Henry Belknap, and the survivor of them, and the heirs of such survivor, to be held in trust and managed by them for the following purposes, to wit: . . . 3. To divide the remaining income, after the payment above described, into four equal parts, for the use of my four children, Edward, Jane, Henry, and George; the parts for Edward, Henry, and Jane to be paid to them, and that of George to be paid to his mother, for his use under her direction during his minority; after he becomes of age, to be paid to himself." Then followed provisions for the disposition of the estate after the decease of his widow, which are not now material.

By codicils to this will Edward Belknap was left the sole trustee. He accepted the trust in June, 1856, gave a bond according to law, and received a large amount of property, real and personal, and, after the settlement of his second account, absconded, having appropriated to his own use a large portion of the trust estate. On the 2d of April, 1859, being largely indebted to the Union Bank, in New York, for money borrowed, he executed to them an assignment, by which he purported to transfer "the share of the estate, both real and personal, of my late father, John Belknap, which by the terms of my said father's will can in any event vest in me, as one of his heirs or devisees, and all my right, title, and interest therein, including any accumulations made, or hereafter to be made of the income of said estate." This assignment was made as additional collateral security, the bank not being satisfied with what they then had. The greater part of that indebtedness is still unpaid. It did not appear whether he was a defaulter to his father's estate at the time of executing the assignment; but it did appear that the officers of the bank had no knowledge or reason to believe that no [a?] default or misapplication of the funds held under the will had then been made.

As against Edward Belknap, the bill was taken for confessed; and the Union Bank alone opposed the granting of the relief sought for. A receiver was appointed to take charge of the estate, pending the suit; and it appeared by his accounts that the share of the income, and the commissions, to which Edward might have been entitled, if he had not been a defaulter, had been reserved. It was contended, in behalf of Henry Belknap, that this share of the income and the commissions ought to be applied to make up the amount of the principal which has been misapplied by Edward; and other parties contended that the same should be applied first to make up the deficiency in the income.

The case was reserved for the determination of the whole court.[1]

A. H. Fiske & G. Putnam, Jr., for the plaintiffs.

W. R. P. Washburn, for the Union Bank.

Hoar, J.[2] We shall have no occasion to decide the question which has been argued in this case, whether the assignment by Edward Belknap to the Union Bank was of any validity whatever; because it is very clear, upon principle and authority, that the estate in the hands of the trustee is bound in equity to discharge the legacies to the other *cestuis que trust*, before he or his assigns can claim any part of it, if the estate has been diminished by a violation of his duties as trustee. The equities of those to whom he is bound by his assumption of the trust are prior and superior to any which he can create in the trust fund by contract. As it was held in Fuller *v.* Knight, 6 Beav. 205, a trustee cannot bargain away his power to make good a deficiency in the trust fund, arising from his breach of trust.

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The doctrine is very succinctly stated in Morris *v.* Livie, 1 Y. & Coll. 380, of which the marginal note is as follows: "If an executor assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the executor; and therefore if the latter, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust."

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That case was very elaborately argued and carefully considered, and seems more directly in point than any other which has been cited. Though not binding upon this court as an authority, we are satisfied that it rests upon sound principles of equity.

A distinction has been strongly pressed by the counsel for the Union Bank, supposed to arise from our statute provisions which require security to be given by executors and trustees for the faithful performance of their trusts. But it is difficult to see any equity which the assignee of a trust fund which is to remain in the hands and under the management of the assignor can have against the sureties on his official bond. The assignor certainly has no claim on the surety to make good to him any loss by his own unfaithfulness. If there were no assignment, equity would obviously require the trustee to pay everything due to others beneficially interested in the fund, if the fund were diminished by his dishonesty, before applying any further part of it to his own use. And there seems to be no good reason why the assignee should be put in a better condition than the assignor. It would be in effect to allow the assignor to take to his own use his share of the trust fund, and by contract with a third party to cast upon his official surety the burden of making it good to a purchaser.

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[1] The statement of facts has been slightly abridged, and the citations of counsel are omitted. — Ed.

[2] Bigelow, C. J., did not sit in this case.

The Union Bank, when they took the assignment, knew that it was of a fund held by Edward Belknap in trust, and which was to continue under his care and management. They took it subject to all the risks of such a condition of things; subject to all equities in favor of the other *cestuis que trust*, arising from the fact that the assignor was trustee; and they acquired no equitable rights against the sureties in the probate bond, because their grantor had none which he could convey.

It does not appear that the defalcation by Edward Belknap is equal to the share of the estate of which he is entitled to the income. If it is not, it is equally for the interest of the bank, and of those who may be entitled to the reversionary interest, if he should not survive his mother, that his share of the income should be applied to make good the capital.

The decree will therefore be, that the assignment shall have no force or effect against any persons beneficially interested in the estate, other than Edward Belknap.

The commissions which have been retained as belonging to Edward Belknap are to be applied first to the payment of the charges and expenses of the receiver. If there is any part remaining, it is next to be applied to the costs of the suit; and the remainder, if any, is to be distributed as income.

The income belonging to Edward Belknap must be applied to make good the deficiency in the trust fund which he has caused. He must be removed from the trust, and a new trustee appointed, and the case sent to a master to take an account; and all other questions, including that of the ultimate rights of the Union Bank under the assignment, except so far as already determined, be reserved.

1895, ch. 544

SECTION II.

By Death.

(*a*) DEATH OF THE TRUSTEE.

ANONYMOUS.

IN THE ——, TRINITY TERM, 1468.

[*Reported in Year Book, 8 Edward IV., folio 6, placitum 1.*[1]]

AND it was moved whether a subpœna would lie against an executor or heir. And CHOKE, J., said that he had formerly sued a subpœna against the heir of a feoffee, and the matter was long debated. And the opinion of the Chancellor and the justices was that it did not lie against an heir, and so he sued a bill to Parliament.

FAIRFAX. This matter is a good stem for discussion when the others come, &c.[2]

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[1] Ellesmere, Office of Chancellor, 86, pl. 26, s. c., to which report the author adds: "Note that it must be intended that the heir had not this land, but that the land was sold before by the feoffee to a stranger; for if the heir had the land, he is liable to the trust as well as the feoffee." See also Cary, 16; Ellesmere, Office of Chancellor, 94, pl. 49. — ED.

[2] "THE CHANCELLOR said (in 1482) that it is the common course in the chancery to grant [subpœna ?] against an obligation and so upon a feoffment in trust when the heir of the feoffee is in by descent or otherwise, for we find records of this in the chancery. HUSE, C. J. When I first came to court, thirty years ago, it was agreed in a case by all the court that if a man had enfeoffed another in trust, if the latter died seised so that his heir was in descent, that then no subpœna would lie; and there is great reason why this should be so, for if by means of a subpœna you may disprove a descent by two proofs in chancery, you may disprove twenty descents, which is contrary to reason and conscience. And therefore it seems to me less of an evil to make him who suffers his feoffee to die seised of his land, lose it, than to disinherit several by proofs in the chancery. . . . To which the CHANCELLOR said, then it is great folly to enfeoff others of my land," &c. Y. B. 22 Ed. IV. fol. 6, pl. 18.

"VAVASOUR, J., said (in 1501) that the subpœna commenced in the time of Edward III., but this was always against the feoffee upon confidence himself, for against his heir the subpœna was never allowed until the time of Henry VI., and in this point the law was changed by Fortescue, C. J." Keil, 42, pl. 7.

"NOTE, that a subpœna lies against the heir of the feoffee who survives." Fitzh. Abr. Subpœna, pl. 14, citing Y. B. 14 Ed. IV. (1474).

It seems almost superfluous to state at the present day that the heir of an intestate trustee takes the legal title to trust property subject to the trust. Fleeming *v.* Howden, L. R. 1 Sc. App. 372; Waggener *v.* Waggener, 3 Monr. 542; Bloom *v.* Rag (Ky. 1891), 16 S. W. R. 714; Druid Co. *v.* Oettinger, 53 Md. 46; Harlowe *v.* Cowdrey, 109 Mass. 183; Hook *v.* Dyer, 47 Mo. 214, 218; Schenck *v.* Schenck, 16 N. J. Eq. 174; Zabriskie *v.* Morris Co., 33 N. J. Eq. 22; Woodruff *v.* Woodruff, 44 N. J. Eq. 349; Graves *v.* Trueblood, 96 N. Ca. 495; Carlisle's App., 9 Watts, 331; Bard's App., 3 Watts & S. 459; Huckabee *v.* Newton, 23 S. Ca. 291; Watkins *v.* Specht, 7 Coldw. 585.

WESTON *v.* DANVERS.

IN CHANCERY, 1584.

[*Reported in Tothill*, 105.]

THE heire is not in equitie bound to assure lands which his father bargained and tooke money for.[1]

If the trust property is personal, the executor or administrator of the trustee takes the legal title subject to the trust. Deering *v.* Torrington, 1 Salk 79; Wheatley *v.* Purr, 1 Keen, 551; Trecothick *v.* Austin, 4 Mason, 16, 29; Veil *v.* Mitchell, 4 Wash. C. C. 105; Dearman *v.* Radcliffe, 5 Ala. 192; Mauldin *v.* Armistead, 14 Ala. 702; Powell *v.* Knox, 16 Ala. 364; Bloxham *v.* Cowne, 19 Fla. 163; Keister *v.* Howe, 3 Ind. 268; (but see Pratt *v.* Cave, 46 Ind. 67;) Thompson *v.* White, 45 Me. 445; Thomas *v.* Kapff, 6 Gill & J. 372; Farrelly *v.* Ladd, 10 All. 127; Childs *v.* Jordan, 106 Mass. 321; Schenck *v.* Schenck, 16 N. J. Eq. 174; Dias *v.* Brunell, 24 Wend. 9; Moses *v.* Murgatroyd, 1 Johns. Ch. 119; De Peyster *v.* Ferrers, 11 Paige, 13; Banks *v.* Wilkes, 3 Sandf. Ch. 99; Bucklin *v.* Bucklin, 1 Abb. App. 242; Bunn *v.* Vaughan, 1 Abb. App. 253; Emerson *v.* Bleakley, 2 Abb. App. 22; *Re* Howell, 61 How. Pr. 179; Boone *v.* Citizens' Bank, 84 N. Y. 83; Wetmore *v.* Hageman, 88 N. Y. 69; *Re* North Co., 63 Barb. 556; De Peyster *v.* Beckman, 55 How. Pr. 90; Whitley *v.* Foy, 6 Jones, Eq. 34; Quinby *v.* Walker, 14 Oh. St. 193; Towne *v.* Birchell, 2 W. N. (Pa.) 304; Read *v.* Read, 8 Rich. Eq. 145.

If one of several co-trustees dies, the legal title survives to the others. Co Lit. 113; Billingstey *v.* Mathew, Toth. 168; Gwilliams *v.* Rowel, Hard. 204; Hudson *v.* Hudson, Talb. 127, 129; Atty.-Gen, *v.* Glegg, Amb. 584; Warburton *v.* Sandys, 14 Sim. 622; Read *v.* Godwin, 1 D. & Ry. 259; Cape *v.* Bent, 9 Jur. 653; Watson *v.* Pearson, 2 Ex. 581; Lane *v.* Debenham, 11 Hare, 188; Wheatley *v.* Boyd, 7 Ex. 20; Peter *v.* Beverly, 10 Pet. 532; Sanders *v.* Schnaelzle, 49 Cal. 59; Richeson *v.* Ryan, 15 Ill. 13; Golder *v.* Bressler, 105 Ill. 419; Gray *v.* Lynch, 8 Gill, 403; Gutman *v.* Buckler, 69 Md. 7; Webster *v.* Vandeventer, 6 Gray, 428 (*semble*); Stewart *v.* Pettus, 10 Mo. 755; Wills *v.* Cooper, 1 Dutch. 137; Osgood *v.* Franklin, 2 Johns. Ch. 1, 14 Johns. 527; Shook *v.* Shook, 19 Barb. 653; Shortz *v.* Unangst, 3 Watts & S. 45; Williams *v.* Otey, 8 Humph. 563; Nichols *v.* Campbell, 10 Grat. 560.

But see *contra*, Boston Co. *v.* Condit, 19 N. J. Eq. 394; Miles *v.* Fisher, 10 Oh. 1.—ED.

In England, by a recent statute, on the death of a sole trustee of land the title vests in the personal representative like a chattel real. *Re* Pilling's Trusts, 26 Ch. D. 432; Lewin, Trusts (9th ed.) 233, 234. But see as to copyholds *Re* Mills, 37 Ch. D. 312. In some jurisdictions under the circumstances the title vests in the court. McDougald *v.* Carey, 38 Ala. 320; Collier *v.* Blake, 14 Kas. 250; Hawley *v.* Ross, 7 Paige, 103; Glen *v.* Gibson, 9 Barb. 634; Millbank *v.* Crane, 25 How. Pr. 193. (In others, although the title goes ~~to the heir, it~~ goes as at common law to the eldest son, the statutory abolition of primogeniture being interpreted as applying only to the devolution of property in which the deceased was beneficially interested.) Boston Co. *v.* Condit, 19 N. J. Eq. 394; Jenks *v.* Backhouse, 1 Binn. 91; Martin *v.* Price, 2 Rich. Eq. 412, 470. — ED. 37 A.J. 508, 511 ; 61 S.C. 243 ;

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[1] Poole *v.* Coxwell (T. 4 Car.) "The father entered into articles for land, the son no party, yet having consented, decreed." — ED.

p. 69 (D v 1649)

STEPHENS *v.* BAILY.

In Chancery, before Tyrrell, J., 1665.

[*Reported in Nelson*, 106.]

Lessee for another man's life contracts with the plaintiff for a sum of money to convey an estate to him, but dies before the conveyance was perfected.

The defendant, being the heir of the lessee *pur auter vie*, enters, and holds the land as special occupant; and a bill being brought against him to perfect the assurance, he demurred to it, and it was insisted for him that he was in possession as an occupant, and so was not privy to his father who made the contract.

Maynard, on the other side, argued, that an occupant is liable to an action of waste, and that was the Dean of Worcester's case; and that an occupant was bound by this agreement in equity: that the plaintiff, who was out of his money, ought to have relief: that where a man contracts for the purchase of lands, and dies before the assurance is executed, the heir of the vendor stands trusted for the purchaser, and is compellable in this court to execute the estate to him, and that trusts here are of another nature than uses are at common law: that a covenant doth not bind an occupant at law, because the estate which he possesseth by the occupancy is not assets in law: but here it is a trust: that if a copyholder takes money, and covenants to convey, his heir is not bound at law, yet this court will compel him.

So in this case, the lands are bound by the agreement in whose hands soever they fall.

Mr. Finch, for the defendant, insisted that this was not like the case of a copyholder; for the lord is bound to admit the heir, and then he is in by descent, and he may have an ejectment before admittance; 't is more like the case of one seised in fee, who contracts to sell, and dies before any assurance, and without heir, so that his lands escheat to the lord: this court will not compel that lord to convey to the vendee. But *Maynard* said, the reason was, because by such conveyance the lord would lose his ancient services which were due before the lands escheated.

To which it was replied, that this did not seem to be a tolerable reason, because the lord might make such a conveyance reserving the ancient services. But it being referred to Justice Tyrrell, he certified, that, having advised with the judges, he was of opinion that the defendant ought to answer; and so it was ordered.[1]

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[1] In *in re* Michell, '92, 2 Ch. 87, the interest of a *cestui que trust pur auter vie* passed to a special occupant.

An occupant seems not to have been bound by a use. Bro. Abr. Feff. al Uses, fol 338, pl. 10. — Ed.

SIR WILLIAM HIX *v.* THE ATTORNEY GENERAL AND ANOTHER.

IN THE EXCHEQUER, HILARY TERM, 1661.

[*Reported in Hardres,* 176.]

UPON English bill the case was, that Sir William Hix put £100 out at interest to the defendant, and took bond in the name of one Toomes, who afterwards became a *Felo de se;* and now the plaintiff was relieved against the King upon this trust in equity, upon the Statute of 33 H. VIII. c. 39, *sed quære* whether that statute extends to any equity against the King otherwise than in case of pleas by way of discharge. But it was likewise decreed in this cause that the plaintiff should be saved harmless from all others.

THE KING *v.* DAME JANE ST. JOHN MILDMAY, LADY OF THE MANOR OF MARWELL, AND WILLIAM BRAY, ESQUIRE, HER STEWARD OF SAID MANOR.

IN THE KING'S BENCH, TRINITY TERM, 1833.

[*Reported in 5 Barnewall & Adolphus,* 254.]

LITTLEDALE, J., in the course of this term, delivered the judgment of the court.[1] After stating the *mandamus* and return,[2] his Lordship proceeded as follows: —

The question is, whether if a copyhold tenant surrender his estate to the use of another, and afterwards commits and is convicted of felony before admittance of the surrenderee, the estate is by the custom forfeited to the lord?

The case was argued before us very elaborately, and all the authorities were fully entered into. The court did not at the time feel greatly pressed by the weight of those authorities; but, as they were numerous, and the argument was chiefly from analogy, we wished to look into them. After a careful examination of them, we are of opinion that the estate is by the custom forfeited to the lord, and that a peremptory

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[1] See *supra,* 70, n. 1. — ED.

[2] The *mandamus,* after reciting the custom of the manor in regard to surrenders, stated that John Boyes, a tenant of the manor, surrendered his tenement August 4, 1830, to H. Southwell; that Southwell demanded admittance, but that the defendants refused. The return stated that Boyes, after the surrender, was convicted of felony, and that by the custom of the manor the tenement of a tenant convicted of felony escheated to the lord of the manor. A rule *nisi* was obtained for quashing this return as insufficient. — ED.

mandamus ought not to issue. It is conceded that, as between the surrenderor and the surrenderee, the latter cannot be prejudiced by any act done by the former subsequent to the surrender, but is entitled to be admitted to the estate free from all mesne incumbrances. It is conceded also that the surrenderor, until the admittance of the surrenderee, continues tenant to the lord for all purposes of service. The estate, therefore, does not by the surrender vest in the lord. It is conceded also that the surrenderee before admittance takes nothing, but that on admittance he is in by relation from the time of the surrender, as between him and the surrenderor, yet he has not been tenant in the mean time; for it is distinctly held, in Doe *dem.* Jeffries *v.* Hicks,[1] that if he be attainted in the mean time, the lord will not take by forfeiture. If, then, no act of the surrenderee before admittance will work a forfeiture, and if it were held that the surrenderor after surrender, although he be tenant, cannot by any act of his work a forfeiture, it would follow that a considerable time might elapse, during which the lord's right of escheat is suspended, and that not by any act of his own, but by the acts of others, which he cannot prevent; for he can neither refuse to accept a surrender, nor compel a surrenderee to come in and be admitted. We do not find any authority for such a proposition. On the contrary, it is laid down by Lord Chancellor Macclesfield, in Peachey *v.* Duke of Somerset,[2] that the lord must always have such a tenant upon his lands as may be sufficient to answer all demands, and capable of committing forfeitures.

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There are many authorities relating to freehold estates, and some relating to copyholds, which show that the tenant shall forfeit only that which he has; and therefore in Pawlett *v.* The Attorney General (which was a case of freehold), it was held that the mortgagor had a right to redeem against the crown, where the mortgagee in possession had been attainted; but it is plain that in that case Lord C. B. Hale, sitting in equity, treated the mortgagee's interest in the land as a mere pledge and security for money. It is no authority whatever for saying that the estate was not forfeited to the lord at law.

It was argued that the court, in cases of *mandamus* to admit to copyhold estates, frequently looks to equitable interests; but, without at all denying that this may be so in some instances, it seems clear that this court cannot, in such a case as the present, enter into a question of trust or adjust the equitable rights of the parties.

Upon the whole, without minutely examining all the cases cited by the learned counsel for the surrenderee, we are of opinion, that as the surrenderor is conceded to be tenant for all purposes of service until the admittance of the surrenderee, so he is also tenant for the purpose of forfeiting.

Rule discharged.[3]

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[1] 2 Wils. 13.

[2] 1 Stra. 454.

[3] Ellesmere, Office of Chancellor, f. 93, pl. 48; Jenk. 6 Cent. pl. 30; Peachey *v.* Somerset, 1 Stra. 447, 454; Burgess *v.* Wheate, 1 Ed. 177, 201, 246 (*semble*); Atty. Gen. *v.* Leeds, 2 M. & K. 343; Benzein *v.* Lenoir, 1 Dev. Eq. 225; King *v.* Rhew, 108

N. C. 700 *Accord.* See also Reeve *v.* Atty. Gen., 2 Atk. 223; Hodge *v.* Atty. Gen., 3 ~~Y. & C. 342.~~

Molton *v.* Henderson, 62 Ala. 426, *contra.*

In Jenkins, 6 Cent. pl. 30: "At this day, where the tenant of the land is attainted of felony or treason, the use and trust for this land are extinguished; for the king, or the lord to whom the escheat belongs, comes in in the *post*, and paramount the trust; and upon a title elder than the use or trust, viz. the right of his lordship by escheat for want of a tenant."

In Atty. Gen. *v.* Leeds, *supra*, Sir John Leach, M. R., said, p. 347: "It was settled by the case of Burgess *v.* Wheate that a *cestui que trust* has no title as against the lord, who claims by escheat upon the death of the trustee without heirs."

In Benzein *v.* Lenoir, *supra*, Henderson, J., said, p. 257: "If Cossart [the trustee] has lost his estate, the *cestui que trusts* have lost theirs also; their interest, being a mere shadow of the legal estate, vanishes when that ceases to exist, that is, when a different one arises, or, in the language of the law, where another comes in the *post* to an estate in the lands. I do not mean where the estate, to which the trusts were annexed, falls into other hands than those appointed by the creator of the trust to take it; as where the devisee in trust dies before the devisor, there the heir takes the estate subject to the trust. The law is the same as to tenants by the curtesy, tenant in dower, and the bargainee under a bargain and sale, who are said not to come in by the trustee, but by the law, their estates being the same with that of the trustee, and cast upon them by law, although not created by the act of the party. Nothing but the technical expressions, the *per* and the *post*, and not going beyond the letter of the maxim into the principle upon which it is founded, can for a moment sustain the idea that those estates were detached from the trusts. But the lord who comes in by escheat above his tenant's estate, the abator, the intruder, the disseisor, who thereby acquire a new estate, are not affected by the trust; and if as against them the trustee loses the legal estate, the trusts immediately vanish, as the shadow disappears when the substance is gone."

The notion that the lord taking by escheat is bound by a trust is countenanced only by the dissenting opinion of Lord Mansfield in Burgess *v.* Wheate, 1 Ed. 177, 229, the reasoning in which is fully answered in Lewin, Trusts (3d ed.), 281, by an alleged but improbable dictum of Lord Bridgman in Geary *v.* Bearcroft, Cart. 67 (see 1 Hargrave's Juris. Exer. 383, 391), and by loose dicta in Eales *v.* England, Prec. Ch. 200, and White *v.* Baylor, 10 Ir. Eq. R. 43, 54.

(By St. 47 & 48 Vict. c. 71, § 6 (following the earlier acts 39 & 40 Geo. III. c. 88, § 12, and 13 & 14 Vict. c. 60, §§ 15, 46), the right of the *cestui que trust* is saved, although the legal title escheats by the failure of heirs of the trustee. See *Re* Martinez's Trusts, W. N. (1870), 70. — ED.

62 Ala. 426, 430
Va. Code 876

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USES. — The lord taking by escheat on the death of a feoffee to uses without heirs was not bound by the use. Y. B. 14 Hen. VIII. f. 4, pl. 5; *supra*, p. 283; Bro. Ab. Feff. al Uses, pl. 40; Chuddleigh's Case, 1 Rep. 122 a, 139 b.

In Chuddleigh's Case, *supra*, Lord Coke said: "Without question a feoffee upon good consideration without notice, disseisor, or lord by escheat, lord of a villain, corporation, an alien born, a person attainted shall not stand seised to a contingent use, no more than to a use *in esse* before the statute of Hen. VIII.;" and Popham, C. J., said, in the same case, 139 b: "The reason why the lord by escheat, or the lord of a villain, should not stand seised to an use, is, because the title of the lord is by reason of his elder title, and that grows either by reason of the seigniory of the land, or of the villain, which title is higher and elder than the use or confidence is; and therefore should not be subject to it." — ED.

SECTION II. (*continued*).

The Descent of Trust Property. ~~A B~~ By Dent.

(*b*) DEATH OF CESTUI QUE TRUST.

ANONYMOUS.

IN THE ——, MICHAELMAS TERM, 1465.

[*Reported in Year Book, 5 Edward IV., folio 7, placitum 16.*]

IF J. enfeoffed A. to his use and A. enfeoffed R., although he sold the land to him; if A. gave notice to R. of the intent of the first use, he is bound by writ of subpœna to perform the will, &c. But if tenant in borough-English enfeoffed one to the use of him and his heirs, the youngest son shall have the subpœna and not the heir general;[1] likewise if a man makes a feoffment in trust of land descended to him on the maternal side and dies without issue, the heir *ex parte materna* shall have the subpœna.[2]

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[1] Y. B. 21 Ed. IV. fol. 24, pl. 10; Y. B. 27 Hen. VIII. fol. 9, pl. 22; Jones *v.* Reasbie, 2 Roll. Abr. 780, pl. 7; Fawcet *v.* Lowther, 2 Ves. Sen. 300, 304 (*semble*); Banks *v.* Sutton, 2 P. Wms 713 (*semble*) *Accord.* — ED.

[2] Burgess *v.* Wheate, 1 Eden, 186, 216, 256; Langley *v.* Sneyd, 1 S. & S. 45, 55; Nanson *v.* Barnes, L. R. 7 Eq. 250 *Accord.*

"If by a custom of a manor land ought to descend to the eldest daughter only, excluding the other daughters, there being no son, and a trust in equity descends to the heir, this shall go to the eldest daughter only, to be relieved upon this in equity according to the custom for the land. P. 10 Car." 2 Roll. Ab 780 [D] 7.

A husband who is entitled by statute to the "personal estate" of his wife dying intestate, succeeds to personalty held in trust for her. Bartlett *v.* Bartlett, 137 Mass. 156.

In Banks *v.* Sutton, 2 P. Wms. 700, Sir J. Jekyll, M. R., said, p. 713: "That trusts and legal estates are to be governed by the same rules, is a maxim that obtains universally; it is so in the rules of descent, as in gavelkind and borough-English there is a *possessio fratris* of a trust as well as a legal estate (*a*); the like rules of limitation (*b*), and as also of barring entails of trusts (*c*), as of legal estates." See to the same effect Freedman's Co. *v.* Earle, 110 U. S. 710, 713. — ED.

(*a*) Chudleigh's Case, 1 Rep. 121 *b*; Brown's Case, 4 Rep. 22 *a*; Wimbish *v.* Tailbois, Plowd. 58; Cunningham *v.* Moody, 2 Ves. 174; Buchanan *v.* Harrison, 1 Johns. & H. 662 *Accord.* — ED.

(*b*) Brydges *v.* Brydges, 3 Ves. Jr. 120, 127; *Re* White, 7 Ch. D. 201 *Accord.* — ED.

(*c*) Goodrick *v.* Brown, Freem. C. C. 180; Washbourn *v.* Downes, 1 Ch. Ca. 213; Brydges *v.* Brydges, 3 Ves. Jr. 120, 127; Wykham *v.* Wykham, 18 Ves. 418 *Accord.* — ED.

REX *v.* WILLIAMS.

IN CHANCERY, FEBRUARY 19, 1735.

[*Reported in Bunbury*, 342.]

Two joint purchasers of a lease for years assign this lease to a third person (a friend of one of the jointenants, and with the consent of the other) but it was without consideration, and no declaration of trust was given, and so the defendant confessed in his answer; the jointenant who consented to assign died in debt.

Upon the bill and answer the question was, whether this trust shall result for the benefit of the jointenant surviving only as it would at law; or whether the creditors of the jointenant that died should come in for an equal moiety in equity.

Nota, The trustee was made executor to him that died, and was also a creditor of his.

Nota, The two jointenants continued to receive the profits jointly after the assignment.

Upon this state of the case the whole Court were of opinion that though survivorship is looked upon as odious in equity, yet that in this case the trust shall survive for the benefit of the surviving *cestui que trust* only.[1]

ANONYMOUS.

IN THE ——, MICHAELMAS TERM, 1465.

[*Reported in Year Book*, 5 *Edward IV.*, 7, *placitum* 18.[2]]

IF there are lord and tenant, and the tenant enfeoffs one without declaring his will and commits a felony, *quære*, who shall have the subpœna, for the lord shall not have it.[3]

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[1] Aston *v.* Smallman, 2 Vern. 556; York *v.* Stone, 1 Salk. 158 *Accord.* — ED.

[2] Ellesmere, Office of Chancellor, f. 85, pl. 22, s. c. — ED.

[3] 2 And. 200; Jenk. Cent. Cas. 190 *Accord.* So the lord was not entitled to the wardship of the heir of *cestui que use* until it was given him by a statute. Y. B. 27 H. VIII. 8–22. — ED.

THE KING *v.* THE EXECUTORS OF SIR JOHN DACCOMBE.

IN THE EXCHEQUER, MICHAELMAS TERM, 1618.

[*Reported in Croke's James,* 512.[1]]

KING JAMES made a lease to Sir John Daccombe and others, of the provision of wines for his Majesty's house for ten years, in trust for the Earl of Somerset. They made a lease for all the term except one month, rendering nine hundred pounds a year. The Earl of Somerset being afterwards attainted of felony, the question was, whether the trust which was for the said earl was forfeited to the king by this attainder. And it was referred to all the justices of England, by command from the king, to be considered of, and to certify their opinions.

TANFIELD, Chief Baron, now delivered all their opinions to be, that this trust was forfeited to the king, and that the executor shall be compelled in equity to assign the residue of the term and the rent to the king. And he cited a case to be adjudged, 24 Eliz., where one Birket had taken bond in another's name, and was afterwards outlawed, that the king should have this bond: and that in 24 Eliz. one Armstrong, being lessee for years, assigned the lease to another in trust for himself, and being attainted of felony, this trust was forfeited to the king. But he said they all held, and so it was resolved in another case,[2] that a trust in a a freehold was not forfeited upon attainder of treason.[3] *Note,* This case I had from the report of Humphrey Davenport, who was of counsel in this case.[4]

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[1] Aleyn, 16, Hob. 214, 1 Sid. 403, Jenk. 6 Cent. pl. 30, Jenk. 7 Cent. pl. 39 s. c. — ED.

[2] Abington's Case (11 Jac.) Hard. 490 (cited). "It was said [with reference to the Stat. 33 H. VIII.] that no use can be forfeited at this day [1593–1598] except the use of a chattel lease; for all uses of freehold are executed by Stat. 27 H. VIII. in possession, so there is no use to be forfeited." 1 And. 294. See 4 Greenbag, 82. — ED.

[3] But see Lewin Trusts (9th ed.), 932–34. — ED.

[4] Bro. Ab., Feoff. al Use, 45; Wike's Case, Lane, 54; Smith *v.* Wheeler, 1 Mod. 16 (*semble*); Raleigh's Case, Hard. 490 (cited); Abington's Case, Hard. 490 (cited); Morgan's Case, 2 Roll. Ab. 807 [B] 9; King *v.* Lamot, 2 Roll. Ab. 807 [B] 11; Eustace *v.* Kildare, 2 Ch. Ca. 188, 1 Vern. 405; Angier's Case, Hard. 490 (cited); Bishop *v.* Curtis, 18 Q. B. 878; *Re* Thompson's Trusts, 22 Beav. 506; *Re* Bateman's Trust, 15 Eq. 355 *Accord.* But the crown, although entitled to the trust, would always upon the application of a creditor of the *cestui que trust* give the creditor the benefit of the trust. Balch *v.* Wastall, 1 P. Wms. 445. — ED.

KING'S ATTORNEY *v.* SIR GEORGE SANDS.

In the Exchequer, Easter Term, 1669.

[*Reported in Freeman, Chancery Cases*, 129.[1]]

Sir Ralph Freeman purchased a lease for years of several manors; afterwards he purchased the inheritance thereof, in the name of Sir George Sands, being his son-in-law, in trust for Sir Ralph and his heirs; afterwards Sir Ralph made his will, and made Mr. Freeman his executor, and appointed that his said executor and Sir George Sands should convey part to Freeman Sands, and part to George Sands, the two sons of Sir George Sands, and their heirs; the residue to all the sons of Sir George Sands, by his then lady (Sir Ralph's daughter), and their heirs, who should be living at the time of his death, and then died. Sir George Sands, at the time of the death of Sir Ralph, had only Freeman Sands (who soon after died without issue) and the said George Sands; but afterwards Sir George had issue another son, called Freeman Sands. Mr. Freeman, the executor, refused the executorship, whereupon administration was granted to Sir George Sands; afterwards, no conveyance being made either of the lease or of the reversion by Sir George Sands, who had both in trust, according to the will, Freeman Sands killed George, his brother, and was afterwards attainted of murder.

The question was, whether any of those trusts, either of the lease or of the reversion, that were so in Sir George, in trust as aforesaid, were forfeited to the king, of whom the lands were holden, by this felony and attainder; who, by the king's attorney, sued Sir George on the equity side of the Exchequer, to answer the profits to the king, supposing those trusts to be forfeited by the felony and attainder.

The case was several times argued at the bar, and this term Chief Baron Hale and Baron Turner (Rainsford being removed into the King's Bench, and Atkins disabled by age) both agreed that this trust was not forfeited.

In their arguments it was agreed, *cestui que trust* in fee, or fee tail, forfeit the same by attainder of treason,[2] and the estate to be executed to the king in a court of equity, by 27 H. VIII. 10, and 33 H. VIII. 2. An alien *cestui que trust* of any estate, the estate belongs to the king; which, the Chief Baron said, was the opinion of the judges in

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[1] Nels. 130, 3 Ch. Rep. 33, Hard. 405, 488 s. c. — Ed.

[2] In the King *v.* Lord Nottingham, Lane, 45, it is observed, "It would be inconvenient that the same land should be subject to several forfeitures, at the same time, by several men;" and it has been declared, subsequently to the present case, and in opposition to the dictum in the text, that the trust of a freehold is not forfeited to the crown by the *cestui que trust* being attainted of treason: The King *v.* The Executors of Sir John Daccombe. Cro. Jac. 513; though, in the same case, it was adjudged that *cestui que trust* of a chattel interest, upon attainder of felony even, forfeits the same to the crown.

Holland's Case,[1] 23 Car. I.; and that an alien cannot purchase but for the king's use, and that he was of counsel in the case. See the case reported in Style, 20, 40.

3. As to the king's debt, by the common law, and by the practice of this court, which is of the common law, *cestui que trust* being indebted to the king, the king shall have execution of his debt on this trust; for before the statute made, 4 H. VII. 17, and 19 H. VII. 5, in the time of H. VI., there be precedents in this court, that the writ of *extendi fac.* for the levying of the king's debt, was of the debtor's land, or of any other land of which any other person was seised to his use; and this was the reason of Sir Edward Cooke's Case,[2] where the interest of the king's debt did attach upon the power of the king's debtor to revoke a settlement made of his estate; and Pasch. 4 Jac. Ford's security, taken in trust for a recusant, was liable to the king's debt of £20 per North; so that where the king's debtor hath the profitable part of the estate, the king shall not lose his debt by any fiction.

4. It was agreed that the trust of the reversion would not be forfeited by felony; which the court held clear, and cited for authorities Marquis of Winchester's Case;[3] 12 Co. 1, 2; 5 Ed. IV. 7; 2 Cro. 513; Stat. 33 H. VIII. And if the inheritance be forfeited for felony, it must be to the lord by escheat, which cannot be, because he hath *cestui que estate* for his tenant; and that no trust of an heir is forfeited for felony, appears by 27 H. VIII. 10, and there is no wrong to the lord as long as he hath a tenant, and therefore till the statute of 19 H. VII. 15, the lord could not seize the lands of which his villein was *cestui que trust;* and if it be demanded what shall become of his trust, as if tenant in fee of a rent-charge dieth without heir, it is answered, the land shall be discharged of this trust, as if tenant in fee of a rent-charge die without heir, or be attainted, the land is discharged.

Trust of a lease for years in gross may be forfeited by felony, or outlawry in a personal action. Earl of Somerset's Case; Dacomb's Case; Balington's Case.

Lease for years, if it be of never so long continuance, if it be assigned in trust for J. S. and his heirs, yet it shall go to his executors; yet trusts are ruled according to the style and course of courts of equity.

A real chattel in law survives to the husband, but not the trust,[4] of a real chattel. Co. Lit. Cap. Remit. 351.

Cestui que trust of an inheritance binds himself and his heirs in a bond, this trust is not assets to the heir; though it hath since been questioned in the Lord Chancellor Hyde's time: but clearly the trust of a lease for years is assets to charge an executor in equity.

So a trust assigned over to wait upon the inheritance, though of a term, shall go to the heirs, and heirs of the body, because a shadow kept on foot for a special purpose; and this hath a great resemblance to the case of charters, which go with the inheritance to the heir, but if granted over, the parchment and wax shall go to the grantee and his executors. 4 H. VII. 10.

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[1] Aleyn, 14.
[2] 2 Rolle's Rep. 294.
[3] 3 Co.
[4] See Freem. C. C. c. 32, p. 29, note 3.

And in the present case no trust of the chattel is forfeited to the king, because the lease for years was not in Freeman, who was attainted of felony, nor the trust in him as a chattel, for that he must have been executor and administrator of George, the son.

And here it was not Sir Ralph's intent that the lease and inheritance should be confounded, and not kept separate; and, again, Freeman could have this trust but as heir to George, and as long as he hath the inheritance in him, and no longer, but it shall go to the heir as charters,[1] *nomine pœnæ*, patronage by foundership, &c.; and the mischief otherwise would be great, to have such waiting terms forfeited by outlawry. And so judgment was given against the king's attorney.

Nelson 134
3 Ch. 37

BURGESS *v.* WHEATE.

In Chancery, before Lord Henley, K., Lord Mansfield, C. J., and Sir Thomas Clarke, M. R., January 24, 1759.

[*Reported in* 1 *William Blackstone*, 123.]

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Lord Keeper.[2] I. First, I shall take notice of the claim of the crown, because several of the arguments I shall make use of on that, will tend to support the opinion I shall give on the other claims. The question on the information is, whether the *cestui que trust* dying without heirs, the trust is escheated to the crown, so that the lands may be recovered in a court of equity by the crown, or whether the trustee shall hold them for his own benefit. (States the case.) On 11 January, 1718, Mrs. Harding conveys to trustees (of whom Sir F. Page was the survivor) the lands in question, in trust for Mrs. Harding, her heirs and assigns, to the intent that she should appoint such estates thereout, and to such [persons] as she should think proper. Mrs. Harding dies without making any appointment, and without heirs *ex parte paterna*. The information charges that the trustee took no benefit, but only for Elizabeth Harding, and to be subject to her appointment; and that she being dead *sans* heirs on the father's side, and having made no disposition of the estate, that Sir F. Page could take no estate for his own benefit by the deed or the fine, but takes it for the benefit of his Majesty, who stands in the place of the heir, and that the premises are escheated to his Majesty. The question, therefore, is entirely a question of tenure, and not of forfeiture.

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[1] Strode *v.* Blackburne, 3 Ves. 226.

[2] The opinion of Lord Keeper has been slightly abridged; the concurring opinion of Sir Thomas Clarke, M. R., and the dissenting opinion of Lord Mansfield, C. J., are omitted, on account of their great length. — Ed.

I shall consider, first, the right of lords to escheat at law. Secondly, Whether they have received a different modification in a court of equity. Thirdly, The arguments used in support of the information; and from the whole draw this conclusion, that the crown has in this case no equity.

1. I shall consider the law of escheat, as settled by the municipal writers in the law, and reporters, and shall not regard what the law was in other countries, as they seem founded and calculated for empire and vassalage, to which I hope in this country we shall never be subject. I will just give a specimen of the feudal law. Craig, 504. *Causæ Amissionis Feudi:* These causes are, incestuous marriages, parricide, fratricide, friendship contracted with the lord's enemies, revealing the lord's secrets, if they affect his life or reputation, outlawry not reversed, and all other causes in the discretion of the prætor. I cite this to relieve me from the doctrine of the feudists. The legal right of escheat with us arises from the law of infeoffment to the tenant and his heirs, and then it returned to the lord, if the tenant died without heirs. The extension of the feoffment from the person of the tenant to the heirs special of the body, and then to his heirs and assigns; is accurately traced in a treatise of tenures by a learned hand:[1] this reduces the condition of the reversion, to this single event, viz. *Ob defectum tenentis de jure.* F. N. B. 337: A writ of escheat lies where tenant in fee of any lands or tenements holds them of another, and tenant dies seised[2] without heirs general or special, the lord shall have the land: because he shall have it in lieu of his services. The books are uniform, that in the case only of tenant's dying without heir, the escheat took place. As long as tenant or his heir, or, by his implied assent, another continued in possession by title, that prevented escheat. The law had no regard to the tenant's right to the land, but in right of his seisin. (All these instances show that where there was a tenant actually seised, though he had no right to the tenements, and though the person who had the right died without heirs, yet the escheat was prevented.) For if the lord has a tenant to perform the services, the land cannot revert in demesne. Roll. Abr. 816; Whittingham's Case;[3] 7 Hen. IV., Heir of Disseisor; 1 Int. 268 *b*, Feoffee of Disseisor. Upon these cases I would observe, that the lord's consent had

[1] Sir M. Wright.

[2] "The words of F. N. B. are so: but *vid.* F. N. B. 338 (C), in these words: 'And if the tenant be disseised, and afterwards dieth without heir, &c., it seemeth the lord shall have a writ of escheat, because his tenant died in the homage.' *Contra*, 32 H. VI. 27 a, pl. 16, and so cited in Com. Dig. *Escheat* (B 2); and the distinction there is that if the tenant be disseised, the lord may enter, but not have a writ of escheat; but if the disseisor had died seised, the lord could neither enter nor have a writ of escheat, ib.; and it seems by the reasoning of the court, 32 H. VI. 27 a, that the lord can in no case have a writ of escheat, except where his entry was lawful. Ibid." MS. Serj. Hill.

[3] 8 Rep. 42 *b*.

nothing to do with establishing the right of the tenant's being duly seised, because in every one of these cases they all come in without the lord's consent; unless it may be said that the lord is a virtual assenter, as well to the disseisins as the legal conveyances. And then, if that be so, it would operate to the establishing the right of the trustee here, who would say he is entitled under a conveyance in law, by the very consent of the lord; which is a stronger case than a disseisin. From these cases and authorities it must be allowed to be settled, that the law did not regard the tenant's want of title, as giving the lord right to escheat.

2. The next consideration is, whether a court of equity can consider it in a different light. Now, when the tenant did not die seised, and a proper legal tenant by title continued, and consequently the lord's seigniory and services continued, can this Court say to the lord, Your seigniory is extinguished, and to the tenant, Your tenancy is so too, though both are legal rights now subsisting at law? In consideration of uses with regard to escheats, equity has proceeded on the same principle as the law, where there was a tenant of the land that performed the services. And I don't find this court had any regard to the *merum jus* of the tenant. Now, the reason why there was no escheat on the death of *cestui que use* in equity seems to be this (and it is a reason equally applicable to uses and trusts), that the court had nothing to issue a subpœna upon, no equity, nothing to decree upon; and every person must bring an equity with him for the court to found its jurisdiction upon. It seems to me he could have no equity in the case of a use, or as owner of a trust, for this plain reason: a use before the statute could not be extended farther than the interest in the estate which the creator of the use could have enjoyed; as if the creator of the use had a fee-simple in the land, he could take back no more interest in the use, either declared or resulting, than he had in the land; if he makes a feoffment, and declares no uses, it results to him in fee, which is to him, his heirs and assigns. The consequence is, that the moment he dies without heirs or assigns, there was no use remaining. How, then, can you come here for a subpœna (whether he took back the same or a different use) to execute a use or trust which was absolutely extinct? That seems to me the plain and substantial reason why, in this case (whether you call it a use or a trust), there was no basis on which to found a subpœna. Lord Chief Justice's system is very great and noble, and very equitably intentioned; such a system as I should readily lay hold of upon every occasion, if I thought I could do it consistently with the rules of law.

What scintilla of equity is given to the lord? Lord Chief Justice supposes that by feoffment to two trustees for Mrs. Harding, her heirs and assigns, and for no other use, the lord is included in "her heirs and assigns." That expression cannot do so. I think the conveyance would have been the same if "assigns" had been left out. Then it is said, the express declaration is to her heirs and assigns, and that there is an implied trust on this; for as the trustees are to take to no other use, and the express trust is served, therefore a trust in fee results to the lord, upon the extinguishment of heirs *ex parte paterna*. To that conclusion I have two objections: 1. I think such a trust would, if declared, be entirely void (and whether declared by way of trust or use, it is the same thing); for when you have limited an estate to a man in fee, or declared the trust to him in fee, you have no more to dispose of in either case, and cannot limit one fee on another. It is said in answer to this, that she could not have limited it to Sir F. Page and his heirs in default of her own heirs, but that a person may limit anything according to the course of law, and there's a reverter to a person in fee in the course of law, therefore you may limit it so. But it reverts by operation of law on extinguishment of an estate that was a fee-simple incapable of any further limitation. The donor could not have limited it so. 2. With regard to the resulting trust there is this objection, which seems to me unanswerable. What is the estate conveyed to the trustees? It is Mrs. Harding's estate. Her husband and she are parties to the deed and fine. They pass all the estate that goes to the trustees. Can anything result by way of trust or use to a person not privy to the estate that passes by the deed? Where you have passed the estate without consideration, there in modern language a use results, or a trust results; because it is inequitable that a man should have an interest in the estate, when he has paid no consideration for it. But where a person is not party to a deed nor privy to the estate, I don't see how anything can result for his benefit. That this was the notion in respect to a use appears from authorities. The law was, that the lord could not have the escheat of a use. So is 5 Ed. IV., for I take that to be the report of a case; then it has all the authority the Year-Books carry with them. And this has been adopted by all the writers since. Bacon, 79, does not question the authority of this case. He gives a reason of his own, which he substitutes as a better than that in the books, that there is a tenant in by title, which is a strong reason in law; but it does not mention that as a reason with regard to the subpœna. It is not a conclusive reason, that the lord shall not have subpœna, because there is a person in possession. He should have it for that reason, if that person is liable to him in equity. Therefore he gives a better reason, because, says he, it never was his intent to advance the lord, but his own blood. Therefore that is the reason; it would not be within the intention of that trust, that any besides the blood of the covenantor should take. Nobody can imagine the tenant intended to provide a trust to answer the lord's escheat. Mrs. Harding never thought of escheat, I suppose; but had it been suggested to her, "If you die without heirs that can possibly take your estate, would you rather have your friend you have chosen to make your trustee take it, or that it should go to the king?" She must have been a subject of more zeal than I can suggest, if she had said she would give it to the king.

As I am now stating the law and equity of escheats with regard to uses and trusts, I will take here notice of an objection that seems equally to affect the opinions of lawyers, with regard to the doctrine of uses and trusts; and that is the dilemma which was urged at the bar, as the basis of an equity in the present case, though I don't think it a necessary dilemma, viz. that the lord must have the estate by escheat, either on the death of *cestui que trust* without heirs, or of the trustee without heirs discharged of the trust; but if he can't have it while the trustee lives, while there is a tenant, it would be monstrous that the *cestui que trust* should be prejudiced by putting the estate in the trustee's hands for the benefit of the family. One part of this is a dangerous conclusion, the other is not. My answer is, that if the law be so that the lord shall in that case take it discharged of the trust, I must suppose it no injury or absurdity at all. *Volenti non fit injuria.* The creator of the trust determines to take the convenience of the trust with its inconvenience. It is most certain, every man who creates a trust puts his estate in the power of his trustee. If the trustee sells it for a valuable consideration without notice, no court can relieve the owner from this misfortune: it is the result of his own act; and yet that is as shocking a perfidy in the trustee as can be; but the court cannot interpose, as it would affect the rights of others, of third persons. But I don't know it has been determined that it shall escheat, discharged of the trusts. I shall give no positive opinion upon it. So far I may say, that unless a trust can be distinguished from a use, the most learned judges say, the right comes as a reversion, failing heirs, and that the time of escheating is, when there is a want of a tenant, the right of the lord being paramount. The trust cannot be affected by it. Chudleigh's Case:[1] the lord comes in the *post* and not in the *per*. Popham,[2] s. c., says, that is the reason why the law is so, and I don't doubt the law. But there is no occasion to give a precise opinion upon it till necessary. But I don't think this is at all a necessary dilemma: the lord may not be entitled on death of *cestui que trust* without heir, because there is no equity, for he has his tenant as he had before. But possibly there might be an equity in the other case against the lord; for if the trustee died without heir, and the lord had the estate, this court might say, You shall hold to compensate yourself for your rent and services, but we will embrace the rest for the *cestui que trust.*

A difference was attempted to be made between uses and trusts. I have seen trusts invented for the blackest purposes in my experience, and to subvert the very constitution of this kingdom. But this is nothing but the abuse of both. But to try if there is or is not any difference between them, the best way is to define both: as, in order to show the difference between one thing and another, 't is usual to define the one and the other, and by comparing the definitions find the difference. Finch, l. 2, c. 22, fo. 22 *b*, says, A use is, where a man has anything to the use of another upon confidence, that the other shall take the profits. He who has the profits has a use. The other books say a use is neither *jus in re* nor *ad rem*, &c. Now, what is a trust? A confidence for which the party is without remedy, but in a court of equity. Lord Chief Justice does not state any difference in the metaphysical essence between a use and a trust, but that there was a difference in the law by which the one and the other was directed; and I think there is no difference in the principles, but there is a wide difference in the exercise of them. It was as much a principle of this court that the use should be considered as the land, or as imitating the land, formerly as now; though the rules were not carried formerly so far, nor the reasoning nor directions (when they were less understood) as at present. To give a [familiar] instance: The elements and principles of geometry were the same in Euclid's time as in Sir Isaac Newton's, though in the latter's time the use of them was much enlarged. It was said, the difference consists in this: that equity has shaped them much more into real estates, than before, when they were uses. As now there is tenancy *per* curtesy of a trust, they may be entailed; and those entails barred by a recovery. But why? Not from any new essence they have obtained, but from carrying the principle further, *quia æquitas sequitur legem*: for as between the trustee and the *cestui que trust* this court had jurisdiction; and I think they should have equally extended in this court the rules and principles of uses as well as trusts. This, therefore, was the effect of the equitable jurisdictions growing to maturity. Lord Bacon says, they grew to credit and strength by degrees. He says, a use is nothing but a general trust, where a man will trust to the conscience of another, rather than to his own estate and possession.

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[1] 1 Co. 122 *a*.

[2] 1 Co. Rep. 139 *b*.

That a use and trust are the same, seems adopted by all the great persons who have presided in this court. Gray *v.* Gray: Lord Nottingham, in a case whether a purchase made in the name of the son was a trust or an advancement, held it the latter, and that there should be no constructive trusts; he grounds himself upon this observation: "All the books agree that a feoffment to a stranger without consideration raised a use to the feoffor by implication." "How can this court justify it to the world if it should make the law of trusts differ from the law of uses, in the same case?" They thought they were so strictly bound by it, they could not depart from it. They act under rules and checks, *i. e.* a discretion put upon them. As in Attorney-General *v.* Scott,[1] Lord Talbot of same opinion. In Goodwin *v.* Winsmore,[2] Lord Hardwicke of same opinion. This court has considered the trust, as between the trustees and *cestui que trust* and those claiming under them, as imitating the possession; and much more than a use was considered in this court; but not more than the court would have modelled uses, if uses had existed at this day. I do not see why the same determination should not be of a use, as imitating the possession, as there is now upon trusts. Would it not be a bold stride to say, this court has considered trusts as a mere nullity and notional; and that they are to be treated just the same as if they continued in the seisin of the creator of them or the person for whom they were made? Rules of property are not to be questioned even by the judges, while the people continue satisfied and acquiesce in them. None but the legislature can alter them. Trusts have imitated lands according to the strength of this jurisdiction always. My objection to the claim in the information is, not that it is to have a trust executed as if it were land, but it is to claim the execution of a trust that does not exist. If there was a trust, I should consider it merely as an estate, and determine accordingly. But the creation of a trust can never affect the right of a third person. The trustee has the burden and the legal privilege. Can this Court say it is a nullity? and yet it must be so said, to take it from the trustee. *Servetur ad imum.* But it cannot be said 't is a nullity in that respect as to a trust accepted. The conveyance shall subject the trustee to all the fruits of tenure. Though he has continued subject to all burdens when the trust subsisted, yet now it is said, as Mrs. Harding is dead, you shall be considered so no longer. As between trustee and *cestui que trust*, to say it is a nullity must be with this restriction, that he shall take no beneficial interest that the *cestui que trust* can enjoy. But any other he may. And therefore in respect to members, sheriffs, coroners, the trustee was the person who had the right to exercise it; and the legislature was forced to interpose, before the *cestui que trust* could have or enjoy that valuable privilege. 7 & 8 Wm. III. c. 25, § 7.

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[1] For 138.

[2] 2 Atk. 525.

I can assign but one reason why that distinction between tenancy by curtesy and in dower has prevailed; and it is applicable to the reason of this case. I have heard the House of Lords was startled at the distinction, and they were told the opinion of conveyancers was so, and that, if it was altered, it might load purchasers with dower, who thought they had purchased free from it. And the Lords would not reverse the judgment, because they would not let it affect the right of a third person. Now it appears to me that at law there can be no escheat, while there is a tenant *de jure*. In equity there could be none, while trusts were called uses, and a trust and a use are exactly the same. How, then, can I say the lord shall lose his escheat, when any man for his own convenience puts his estate in trust? It seems, if I were to do so, that I should give law and equity, and not pronounce upon law and equity.

376, 377 ✓

Two centuries have passed since uses and trusts have been admitted, and [1] I cannot find a dictum that the crown shall have an escheat of a trust; but I find in other books the contrary, and by one of the most learned judges that ever adorned the profession. Hale, 247. Every writer of learning has transcribed and adopted this position, so that it is confirmed by them, viz., by attainder of felony of the feoffee, the lord shall have the land by escheat. Stanford, P. C. 186; Pinb's Case; Hix *v.* Attorney General.

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[1] This passage should be as follows: "Two centuries have passed since uses were extinguished, and since trusts have arisen; yet," &c. MS. Serj. Hill; 1 Eden, 252.

In Sir George Sandys's Case,[1] the court had no doubt upon that part of the case applicable to the present; viz., upon forfeiture of the fee-simple. The doubt was, whether the forfeiture should take place on a term in gross or attendant upon the inheritance. 'T was objected there, who should have the trust? The Court said, Sir George Sandys should hold the land discharged of the trust of the term, as in the case of a grantee of a rent dying without heirs. And this is an answer to an objection for want of right and title in the defendant. The grantee there had purchased a perpetual rent and paid for it; the grantor had sold it; the grantee dies without heirs; there's nobody to call upon the person in possession for the rent. The reason why he should hold it is, here is nobody to call upon him; therefore no man can have a better right than he. How came it not to be considered in that case that it was a casualty that should come to the crown as *ultimus hæres?* Yet it never was; for confiscations are hard things, and contrary to the genius of a free country; and the law of England seems to have made a confiscation in no case, but where there is a vacant possession: and there 't is for peace sake, and that quarrels may not ensue. But where a person is possessed of a thing, without getting it against law, he has a title. The judgment in Sir George Sandys's Case being an authority in point, great efforts are made to weaken the validity of it. Lord Hale's abilities have been questioned in equity. Then called a case of compassion; and that the family was concerned in it. That the contending party was the crown; that the Attorney General could not drop the right, &c. But Lord Hale determined on great principles of law; and I can't help remarking, neither bar nor bench were ever frightened at the ill consequences which might follow which have been now mentioned. Perhaps they considered that it was the act of the party himself. They might carve out what estates they pleased, and reserve the limitation in fee. Does this court sit here to guard against the oscitancy or inattention of conveyancers in making use of trusts, and not preventing an escheat to the lord? Wherever the king is not lord his pardon would not signify; the escheat arises on the judgment. If the king pardons the felon, what hinders him from suing his trustee? Attainder don't prevent his assigning his trust. 'T is determined in outlawry it does not. 'T is said, the king on a legal escheat shall be liable to the equity of redemption, and 't is said to be held so by Lord Hale.[1] But I don't know that has been determined. And I observe, though they agreed in opinion, they could not agree on the remedy, though they agreed in equity. I hope the Exchequer has (now) ascertained the remedy. I see an original equity impressed upon that case.

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[1] 1 W. Bl. 143, 149; and 2 Hawk. P. C. c. 27, § 54.

The mortgage is made on condition. I would not have it understood that there's any equity for the subject, that the king is not equally entitled to; but I think the arms of equity are very short against the prerogative. 'T was said, if a mortgagor die without heir, shall the mortgagee hold the land free? (I answer, Shall it escheat to the crown?) No, because in that case the lord has a tenant to do his services, and that is the whole he is entitled to in law and equity. What the justice might be between the mortgagor and executor I shall not trouble myself about. I think the crown has not an equity on which to sue a subpœna.

Original bill dismissed as to all the rest, and the information on the part of the crown dismissed totally.[1]

MIDDLETON *v.* SPICER.

IN CHANCERY, BEFORE LORD THURLOW, C., MARCH 20, 1783.

[*Reported in* 1 *Brown, Chancery Cases,* 201.]

THIS case stood in the paper for further directions in Easter Term, 1780. Daniel Goodwin, seised in fee of copyhold lands, which he had contracted to sell, and also possessed of leasehold and other personal property, made his will, and thereby devised his copyholds and leaseholds to be sold, and the money arising from the sale he bequeathed to his executors in trust, after payment of debts and legacies, to pay the residue to the Society for the Propagation of the Gospel, and gave legacies to the executors. In 1767 the testator died without issue. In 1773 three of the executors of the testator filed a bill, insisting that the devise in favor of the Gospel Society was void, and claiming the residue as undisposed of.

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[1] Henchman *v.* Atty. Gen., 3 M. & K. 485; Taylor *v.* Haygarth, 14 Sim. 8; Davall *v.* New River Co., 3 De G. & Sm. 394; Beale *v.* Symonds, 16 Beav. 406 (conf. Down *v.* Morris, 3 Hare, 394, and Simpson *v.* Corbett, 10 Ont. Ap. 32); Cox *v.* Parker, 22 Beav. 168; *Re* Thompson's Trusts, 22 Beav. 506; Harrop's Est., 3 Drew. 726; Sweeting *v.* Sweeting, 33 L. J. Ch. 211; 3 N. R. 240, s. c.; Gallard *v.* Hawkins, 27 Ch. D. 298; *Re* Lashman, '91, 1 Ch. 258; Anon., 78 Law Times, 77 (cited); Keogh *v.* McGrath, 5 L. R. Ir. 478 *Accord.*

It has been argued with much force that the crown, though not entitled on the principle of escheat, should nevertheless have the trust, on the failure of the heirs of the *cestui que trust*, as a *bonum vacans.* 4 L. Q. Rev. 330–336. The American cases, which are opposed to Burgess *v.* Wheate, must rest upon this doctrine. Matthews *v.* Wood, 10 Gill & J. 443 (see also Smith *v.* McCann, 24 How. 405); Johnson *v.* Spicer, 107 N. Y. 185; Commonwealth *v.* Naile, 88 Pa. 429 (statutory).

Conf. Onslow *v.* Wallis, 1 MacN. & G. 506.

By an English statute, 47 & 48 Vict. c. 71, § 4, equitable interests in land are now brought within the rules of escheat. — ED.

On the 11th November, 1774, there was a decree, that the contract for the sale of the copyholds should be carried into execution, and the money to arise therefrom be considered as part of the personal estate, and that the devise of the leasehold estate to the charity was void; it was therefore decreed to be sold, and the next of kin (none of whom were before the court) were to go before the Master and prove their kindred. The leasehold was sold for £1,560. Upon an inquiry after next of kin, nobody claimed as such. And the question now was, whether upon the void devise the executors were beneficially entitled, or the crown, the Attorney General being made a party to the bill, and claiming in that behalf.

Mr. Kenyon (for the executors).

Mr. Attorney General, contra.

Mr. Kenyon (in reply).[1]

Lord Chancellor. I do not see how this case is distinguishable in principle from Burgess *v.* Wheate. The devise vests the legal property in the executor. If there is no executor, the crown may grant letters-patent to take out administration. The question results, whether the executor, being appointed only as a trustee, can claim as highly as an occupant at common law. Where there is a trustee, the general rule of the court is that he can have no other title. Mr. Kenyon contends, that the executor, being clothed with a legal title, has a right to hold the property. Burgess *v.* Wheate was determined upon divided opinions, and opinions which continue to be divided, of very learned men. The argument of the defect of a tenant seems to be a scanty one. Whether that case is such a one as binds only when it occurs *speciatim*, or affords a general principle, is a nice question. Thus much is decided, that in the case of a trustee who has merely an office, the court has been of opinion that the same claim which would have been competent if it had been at common law is not competent for such a trustee. Here the executor has a common-law right. The crown would have had a right had there been no executor. This case, I think, is obnoxious to every principle that can be drawn from Burgess *v.* Wheate. The legal estate in the trustee must remain in him, unless there is a claim against him which affects his conscience. If beyond the general title, there must be a privity with the testator; the crown has no such privity. If the trustee ought to hold it for every person who would have been entitled if it were at law, then he should hold it for the crown as well as any other person.

The cause stood over, and now came before the court for judgment. The reporter was absent, but has been favored with the following note.

Lord Chancellor. It would be mere pedantry to run over all the cases to be met with on this subject, which are collected and fully stated in Burgess *v.* Wheate. This is not a case in which the assets can be marshalled, which is never done, unless to make a debt of an inferior nature payable. (Lord Mansfield did not assent to the argument of the Master of the Rolls in Burgess *v.* Wheate, respecting an escheat; but no such question arises in the present case.) Here the executors, having legacies bequeathed, and being clearly trustees, cannot by any possibility take any beneficial interest.[1] In Burgess *v.* Wheate, and every other case that is to be met with, the Attorney General has been a party, which shows that it was always the opinion that the crown had such an interest in cases of this kind that it was necessary to make him a party. The executors being excluded, and no relations to be found, I consider the executors as much trustees for the crown as they would have been for any of the next of kin, if these could have been discovered.[2]

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[1] The arguments of counsel are omitted. — Ed.

Therefore decreed in favor of the crown, but directed all the executors' expenses to be paid. 1901 1 Ch. 15 - [illegible]

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[1] See Martin *v.* Rebow, 1 Bro. C. C. 154, notes and cases cited; 2 Story Eq. Jur. c. 33, § 1208, and notes.

[2] Barclay *v.* Russell, 3 Ves. Jr. 424; Taylor *v.* Haygarth, 14 Sim. 8; Powell *v.* Merritt, 1 Sm. & G. 381; Cradock *v.* Owen, 2 Sm. & G. 241; Russell *v.* Clowes, 2 Coll. 648 (*semble*); Read *v.* Stedman, 26 Beav. 495; Darrah *v.* McNair, 1 Ashm. 236 (*semble*); *Accord.*

In Taylor *v.* Haygarth, 14 Sim. 8, Sir L. Shadwell, V. C., said, p. 18: "The distinction between the case of Middleton *v.* Spicer and the case before me is, that in the case of Middleton *v.* Spicer the subject of dispute was personal estate. It was a mere chattel real; and there is no doubt that, by the law of the land, the crown is entitled to the undisposed-of personal estate of any person who happens to die without next of kin."

In Fox *v.* Horah, 1 Ired. Eq. 358, a debt due to A. as trustee for a corporation was held to be extinguished in equity when the corporation became defunct. This is clearly erroneous. The State was entitled, as in Bishop *v.* Curtis, 18 Q. B. 878. — Ed.

1899, 1 Q.B. 325

a St. [illegible] to claim [illegible] to defunct corp.

SECTION III.

By Forfeiture.

PAWLETT *v.* THE ATTORNEY GENERAL.

In the Exchequer, Trinity Term, 1667.

[*Reported in Hardres*, 465.]

In a bill to redeem a mortgage, the case appeared to be thus: viz., the plaintiff had mortgaged lands in fee to one Ludlow for security of £3,000 with interest, and bound himself in a statute and recognizance to perform the covenants of the mortgage, and to pay the money with interest at a certain day. The day past, the money unpaid. The mortgagee by his will devised all his goods, chattels, debts, and personal estate, his debts and legacies being paid, to his executor, and dies. Edmund Ludlow, son and heir of the mortgagee, is attainted of high treason by the new act of 12 Car. II. The king seizes; and the executor extends the plaintiff's lands upon the recognizance, who thereupon exhibits his bill against the king and the executor, and in it suggests that he could not pay the money at the day at the place appointed, viz. in the Strand in Middlesex, by reason of the plague; and that afterwards the mortgagee accepted the interest, and waived the forfeiture: and the question now upon a demurrer to the bill was, whether or no the plaintiff could have any remedy against the king, to have a redemption?[1]

Hale, Chief Baron. This is a case of great concern, and deserves great consideration. It was made a question in this present Parliament in the House of Lords, in the Earl of Cleveland's case; first, whether or no there be a right of redemption in this case against the king? And, secondly, if there be, what remedy must be taken? And I answered, as I take the law to be, that in natural justice redemption of a mortgage lies against the king. But to the other question I made no answer; because I took it to be a point of great importance. But I am of opinion, that the king cannot be compelled to recovery; but that an *amoveas manum* only lies in such case. And this is all that can be done, if a trustee forfeit the estate. And it is to be considered here, whether or no there be a right of redemption against the lord by escheat (for so the king is in here, and not by his prerogative), and how the course of chancery is in case of the redemption of mortgages, who shall redeem, and against whom. I agree the case of a statute merchant, for he comes in merely by the party, viz. by the act of the party, and the remedy that the law gives thereupon; and it is worth inquiring how the presidents are, where a trustee for years is outlawed, and the lands seized, what remedy the *cestui que trust* has there? But admitting that case, yet it may be otherwise in case of a fee-simple; as *cestui que trust* for years may forfeit his interest for felony; but *cestui que trust* in fee cannot; and I agree the case in 3 Ed. III. And I conceive that a mortgage is not merely a trust, but a title in equity. And the matter of redemption, it seems, is not the main business in the case; for Mr. Attorney General offers to give way to a redemption, upon payment of the money: but the point is, who shall have the money, whether the executor and devisee, or the king? for both contend for it.

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[1] The arguments of counsel are omitted. — Ed.

And the Chief Baron further said: If the condition of a mortgage be to re-enter upon payment of the money to the executors or administrators, there without doubt the heir should not have the money after forfeiture; because the mortgagee looked upon it only as a chattel; though if the word "heirs" were inserted into the condition, it would be more a question. But he said, he took the law to be the same in both cases. Yet he delivered no opinion in the principal case, but ordered a case to be made of it. And the cause was adjourned.

Afterwards in Hilary term, *in annis* 19 & 20 Car. II., it was argued again by counsel on both sides; and much to the same effect as before. And again the king's counsel insisted, that a mortgagor was not relievable against the king in equity:

First, because the king is not liable to a trust; and a mortgage forfeited is of the same nature.

Secondly, because by the escheat the ancient right and tenure is destroyed, and the king is in *jure coronæ*.

Thirdly, estates in dower, frank-bank, tenancies by the curtesy, and of disseisors, are not liable to trusts, because they are in the *post;* otherwise of occupancies.

Fourthly, the chancery has no jurisdiction over the king's conscience, but over the consciences of subjects only; for that it is a power delegated by the king to the chancellor, to exercise the king's equitable authority betwixt subject and subject. Nor is it within the statute of 33 Hen. VIII. cap. 39, for equity against the king in the exchequer. And they cited Dyer, 8, 263; Lane's Rep. 54; Yelv. 115; Lane's Rep., Bowle's case.

HALE, Chief Baron. There is a diversity betwixt a trust and a power of redemption; for a trust is created by the contract of the party, and he may direct it as he pleaseth; and he may provide for the execution of it, and therefore one that comes in in the *post* shall not be liable to it without express mention made by the party; and the rules for executing a trust have often varied, and therefore they only are bound by it, who come in in privity of estate. A tenant in dower is bound by it, because she is in in the *per*, but not a tenant by the curtesy, who is in the *post*. So all who come in in privity of estate, or with notice, or without a consideration. But a power of redemption is an equitable right inherent in the land, and binds all persons in the *post*, or otherwise. Because it is an ancient right, which the party is entitled to in equity. And although by the escheat the tenure is extinguished, that will be nothing to the purpose, because the party may be recompensed for that by the court, by a decree for rent, or part of the land itself, or some other satisfaction. And it is of such consideration in the eye of the law, that the law takes notice of it, and makes it assignable and devisable.

But the most considerable things in the case are:

First, that the king is in actual possession, and cannot be removed in equity by an *amoveas manum*, as he may at law.

Secondly, whether there will not be a diversity betwixt the estate of a ward and an escheat: for in cases of wardships, the court of wards had jurisdiction by the 33d of Hen. VIII., but in this case here is an actual inheritance in the king.

Thirdly, the statute of 33 Hen. VIII. c. 39, is to be considered, which gives relief in equity against the king. And I conceive clearly, that in this case the executor would be relieved against the heir for the money; because in common estimation it is but a personal estate.

But Baron ATKYNS was strongly of opinion that the party ought in this case to be relieved against the king, because the king is the fountain and head of justice and equity; and it shall not be presumed that he will be defective in either. And it would derogate from the king's honor to imagine, that what is equity against a common person should not be equity against him.[1]

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[1] "Pawlett *v.* Attorney General, Hard. 465, in which Lord Hale and Baron Atkins thought the king was bound by an equity of redemption, was not a case of *escheat*, as called by Lord Hale, but a forfeiture." Lewin, Trusts (7th ed.), 227 n. (*f*). — ED.

SECTION IV.

By Disseisin.

LORD COMPTON'S CASE.

IN THE COMMON BENCH, TRINITY TERM, 1580.

[*Reported in* 4 *Leonard*, 196.[1]]

NOTE, it was holden by Lord Anderson, C. J., that if *cestui que use* after the Statute 1 Rich. III. leaseth for years, and afterwards the feoffees release to the lessee and his heirs, having notice of the use; that that release is to the first use. But where the feoffees are disseised and they release to the disseisor, although that they [he ?] have notice of the use, yet the same is to the use of the disseisor; and no subpœna lieth against the disseisor.

THE EARL OF WORCESTER AND OTHERS *v.* SIR MOYLE FINCH AND ELIZABETH HIS WIFE.

IN CHANCERY, MICHAELMAS TERM, 1600.

[*Reported in Fourth Institute*, 85.]

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[illegible]
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THE queen, being seised of the manor of Raveston and of certain lands in Stokegoldington (which the plaintiff pretended to be a manor either in the right or reputation), granted by her letters-patent the manors of Raveston and Stokegoldington to the said Sir Moyle, and John Awdelye, and their heirs; but this was upon confidence, that they should grant the manor of Raveston to Sir Thomas Heneage and Anne his wife, and to the heirs of Anne; and the manor of Stokegoldington to Sir Thomas and Anne, and the heirs of Sir Thomas. Sir Moyle and Awdelye, by deed indented and inrolled *termino Trin.* 1588, 30 Eliz. in this court, for £1,000 bargained and sold to Sir Thomas Heneage and his wife the manors of Raveston and Stokegoldington, and the site of the priory of Raveston in the county of Buck., and all other their lands, tenements, and hereditaments in Raveston, Weston, Pidington, and Stokegoldington, in the county of Buck. To have and to hold the manor of Raveston and the site of the said priory, and all the premises in Raveston, Weston, Pidington, and Stokegoldington (other than the said manor of Stokegoldington), to the said Sir Thomas and dame Anne, and the heirs of the said dame Anne; and to have and to hold the said manor of Stokeg. to the said Sir Thomas and dame Anne, and to the heirs of Sir Thomas. Sir Thomas had issue by the said dame Anne the said Elizabeth, one of the defendants, his only child, and afterwards the said dame Anne died. The defendant alleged that Sir Thomas was disseised of Stokegoldington, and the plaintiff denied it.[1] And after Sir Thomas, by deed indented and inrolled, bargained and sold the manor of Stokegoldington to the plaintiff for payment of his debts and died; and for payment of his debts they exhibited their bill against Sir Moyle, and the said Elizabeth his wife, for the said manor of Stokegoldington, and the Lord Chancellor decreed it for the plaintiff. And upon a petition preferred by the defendants to Queen Elizabeth, she referred the consideration of the whole case to all the judges of England; and after hearing of the counsel of both parts on several days, and conference between themselves, these points for rules in equity were resolved: First, that if there were any disseisin that nothing passed to the plaintiff either in right or equity, for the disseisor was subject to no trust, nor any subpœna was maintainable against him, not only because he was in the *post*, but because the right of inheritance or freehold was determinable at the common law and not in the chancery, neither had *cestui que use* (while he had his being) any remedy in that case. Secondly, it was resolved by all the justices, that admitting that Sir Thomas Heneage had a trust, yet could not he assign the same over to the plaintiff, because it was a matter in privity between them, and was in nature of a chose in action,[2] for he had no power of the land, but only to seek remedy by subpœna, and not like to *cestui que use*, for thereof there should be *possessio fratris*, and he should be sworn on juries in respect of the use, and he had power over the land by the statute of 1 R. III. cap. 1, and if a bare trust and confidence might be assigned over, great inconvenience might thereof follow by granting of the same to great men, &c. Thirdly, when the land descended to Elizabeth, one of the defendants, as heir to her mother, and the trust descended to her from her father, the trust was drowned and extinguished. Fourthly, when any title of freehold or other matter determinable by the common law come incidently in question in this court, the same cannot be decided in chancery, but ought to be referred to the trial of the common law, where the party grieved may be relieved

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[1] 2 Leon. 211 s. c. — ED.

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[1] By the report of the same case in 2 And. 163, Sir Moyle was the disseisee. "After which in the same court it was shown that at the time of the assurance made (as above is shown) by the said Sir Moyle, &c., they were disseised of all the lands in Stokegoldington, so that nothing could be conveyed of this to others by such conveyance." — ED.

[2] "An husband possessed of a lease for years, assigns it to B. in trust for himself and his wife; the husband cannot assign this trust, for a trust is nothing in law. . . . Assignments of trusts beget strife and maintenance, and are void in law." Anon. (1576), Jenk. 6. Cent. 244, pl. 30. But a trust was held to be assignable in Warmstrey *v.* Tanfield (1628), 1 Ch. Rep. 29. — ED.

by error, attaint, or by action of higher nature. And when the suit is for evidences, the certainty whereof the plaintiff surmiseth he knoweth not, and without them he supposeth that he cannot sue at the common law. It was resolved that if the defendant make no title to the land, then the court hath just jurisdiction to proceed for the evidence; but if he make title to the land by his answer, then the plaintiff ought not to proceed, for otherwise by such a surmise, inheritances, freeholds, and matters determinable by the common law shall be decided in chancery in this court of equity. And thus were these points resolved by Sir John Popham, Sir Edmond Anderson, Sir William Periam, and Walmeslye, Gawdye, Fenner, and Kingesmill, justices, and Clark and Savill, barons of the exchequer; and all this amongst other things they certified under their hands into the chancery, and thereupon the former decree was reversed. And in debating of this case it was resolved by the two chief justices, chief baron, and divers other justices, that if a man make a conveyance, and express an use, the party himself or his heirs shall not be received to aver a secret trust, other than the express limitation of the use, unless such trust or confidence does appear in writing, or otherwise declared by some apparent matter. And Popham said, that covin, accident, and breach of confidence were within the proper jurisdiction of this court.[1]

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[1] See Turner *v.* Buck, 22 Vin. Ab. 21, pl. 5.

There is a perfect analogy between the converter of a chattel and the disseisor of land in regard to their relations to the *cestui que trust* of the misappropriated property. Colburn *v.* Broughton, 9 Ala. 351. The defendant, Broughton, under a judgment against A., levied upon and sold certain chattels belonging to one Coolidge, as trustee for the plaintiff. The plaintiff's bill against Broughton was dismissed. GOLDTHWAITE, J., said, p. 362: "We readily concede that a purchaser of trust property from, or under the trustee, with notice of the trust, is himself chargeable in equity as a trustee. But here there is nothing to connect the defendant with the trustee, and they claim adversely to him; it is not his title which they held, or one derived through him, but their claim, if good at all, is so entirely independent of the trust deed. To insist that equity can take jurisdiction of a title thus disputed, would invest it with cognizance of all disputes concerning property upon which a trust had ever been created.

"It is entirely evident, that property held in trust is as much the subject of inquiry as that which is not, but it is too common a mistake to suppose the creation of a trust carries the property itself into equity. The law usually provides a different and more appropriate forum to determine conflicting and adverse titles to the property. We fully recognize the rule, that a purchaser of trust property from, or under the trustee, with notice of the trust, is himself chargeable in equity as a trustee. (Bank of Alabama *v.* Williamson, 7 Ala. Rep. 906.) But according to the allegations of the bill, Broughton never had possession of the property sold, as the administrator of Coolidge, and was not therefore affected by the obligations which his intestate had assumed with relation to it. He obtains a judgment against Colburn, and directs a levy upon property which that person is supposed to own. In doing this, we apprehend he stands as any other plaintiff who wrongfully directs a levy, and is responsible to the injured party in trespass or trover. The title sold under his execution was not the title of Coolidge, the trustee, but that of a third person which, if defective, invests the purchaser with one that is of the same nature. Whatever may be the merits of this title, the purchaser, it is evident, does not derive it from the trustee, either mediately or immediately, and in no sense can be said to be in collusion with, or holding under him. In point of fact, the whole case, as to these purchasers, makes it apparent they claim adversely to the trust estate, and in spite of it. It is then, as to all the defendants except the husband, an attempt to litigate the title to personal property in a court of equity. We know of no condition of facts under which a court of this description can determine such a question. Doubtless a *cestui que trust* may go into equity to prevent a sale of the trust estate, until the right can be ascertained elsewhere. To this effect is Cozzens *v.* Calhoun, 3 Ala. Rep. 498, where an injunction was sustained by a *feme covert* to restrain her husband's creditor from selling her separate estate. Here, however, the property has already been converted, and the suit is, to regain, or have satisfaction for it, from persons who neither claim under, or are in privity with the trustee.

"The mere circumstance that a trust is created upon certain property, does not invest a court of Chancery with jurisdiction to determine the disputes which may arise with respect to the *title* to that property. If it was so every *cestui que trust* might sue in equity, instead of his trustee at law, for injuries done to it. Lord Redesdale said, a *cestui que trust* is always barred by length of time operating against the trustee. If the latter does not enter, and the *cestui que trust* does not compel him to enter as to the person claiming paramount, the *cestui que trust* is barred. (Hovenden *v.* Lord Annesly, 2 Sch. & Lef. 629.) And Lord Hardwicke had long before held, the rule applied only as between *cestui que trust* and trustee, and not between them on one side and a stranger on the other. (Lewellen *v.* Mackworth, 2 Equity Ca. Ab. 579.) In Finch's case, 4 Inst. 85, so long ago as the reign of Elizabeth, it was resolved by all the judges, that a disseisor was subject to no trust, nor any *subpœna* was maintainable against him: not only because he was in the *post*, but because the right of inheritance of freehold was determinable at the common law, and not in Chancery; neither had the *cestui que trust* any remedy in that case. To the same effect is Mr. Sugden, in his edition of Gilbert on Uses, 429, note G., who there says, that persons claiming the legal estate by an actual disseisin, without collusion with the trustee, will not be bound by the trust. Therefore, if J. oust A., who is a trustee for B., and a claim is not made in due time, A. will be barred, and his *cestui qus trust* with him, although J. had notice of the trust. These citations seem conclusive to show, that the creation of a trust has no effect to draw the contest with respect to the title of the property to a court of Chancery, and that it is only persons who are trustees, or who claim under such, or by collusion with them, who are accountable to the *cestui que trust*." — Ed.

Uses. — In Chuddieigh's Case, 1 Rep. 120 *a*, Popham,C. J., said, 139 *b*: "The reason why a disseisor should not stand seised to an use was, because *cestui que use* had no remedy by the common law for any use, but his remedy was only in chancery; and because the right of a freehold or inheritance could not be determined in chancery, his title should not be drawn into examination there; and for this reason a disseisor shall not be compelled in the chancery to execute an estate to *cestui que use*, but *cestui que use* shall compel his feoffees in the Court of Chancery to enter upon the disseisor, or to recover the land against him at the common law: and then the chancery will compel the feoffees to execute the estate according to the use." — Ed.

SECTION V.

By Marriage.

(*a*) BY MARRIAGE OF THE TRUSTEE.

NOEL *v.* JEVON.

IN CHANCERY, MICHAELMAS TERM, 1678.

[*Reported in Freeman's Chancery Cases*, 43.]

THE bill was to be relieved against the defendant's dower, her husband being only a trustee; and it appearing that the husband was but a trustee, the defendant was barred of her dower, contrary to the opinion of Nash *v.* Preston;[1] and so it was said is the constant practice of the court now.[2]

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[1] Cro. Car. 191.

[2] Bevant *v.* Pope, Freem. C. C. 71; Hinton *v.* Hinton, 2 Ves. 631; Powell *v.* Monson, 3 Mason, 347, 364; Robison *v.* Codman, 1 Sumn. 121, 129; Bailey *v.* West, 41 Ill. 290; King *v.* Bushell, 121 Ill. 656; Langworthy *v.* Heeb, 46 Iowa, 64; Dean *v.* Mitchell, 4 J. J. Marsh. 451; Bartlett *v.* Gouge, 5 B. Mon. 152; Dimond *v.* Billingslea, 2 Har. & G. 264; Cowman *v.* Hall, 3 Gill & J. 398; White *v.* Drew, 42 Mo. 561; Prescott *v.* Walker, 16 N. H. 340, 343 (*semble*); Hopkinson *v.* Dumas, 42 N. H. 296; Germond *v.* Jones, 2 Hill, 569, 573; Cooper *v.* Whitney, 3 Hill, 95; Gomez *v* Tradesmen's Bank, 4 Sandf. 102; Buffalo Co. *v.* Lampson, 47 Barb. 533; Terrett *v.* Crombie, 6 Lans. 82; Greene *v.* Greene, 1 Ohio, 244, 249; Derush *v.* Brown, 8 Ohio, 412; Firestone *v.* Firestone, 2 Ohio St. 415; Plantt *v.* Payne, 2 Bail. 319; Thompson *v.* Perry, 2 Hill Ch. 204; Gannaway *v.* Tarpley, 1 Coldw. 572 *Accord.*

Nash *v.* Preston, Cro. Car. 191 (overruled); Holbrook *v.* Finney, 4 Mass. 566 (*semble*), *contra.*

See also Hiscock *v.* Jaycox, 12 N. B. R. 507; Bopp *v.* Fox, 63 Ill. 540; Simpson *v.* Leech, 86 Ill. 286; McClelland *v.* McClelland, 65 Me. 500; Dyer *v.* Clark, 5 Met. 562; Willet *v.* Brown, 65 Mo. 138; Coster *v.* Clark, 3 Edw. 428; Mowry *v.* Bradley, 11 R. I. 370; George *v.* Cooper, 15 W. Va. 666, in which cases it was decided that the widow of a partner was not entitled to dower in land held by husband as trustee for the partnership. The cases of Markham *v.* Merrett, 8 Miss. 437, and Smith *v.* Jackson, 2 Edw. 28, *contra,* cannot be sustained.

A wife has no homestead interest in land held by her husband as trustee. Osborn *v* Strachan, 32 Kas. 52. — ED.

CURTESY. — A husband is not entitled to curtesy in lands of which his wife is seised merely as trustee. Bennet *v.* Davis, 2 P. Wms. 318; King *v.* Bushell, 121 Ill. 656; Chew *v.* Commissioners, 5 Rawle, 160. See also Welch *v.* Chandler, 13 B. Mon. 420. — ED.

USES. — The wife and husband of a feoffee to uses were entitled to dower and curtesy respectively. Y. B. 14 Hen. VIII. f. 4, pl. 5; *supra*, p. 284; Bro. Ab. Feff. al Uses, pl. 40; Chuddleigh's Case, 1 Rep. 122 *a*; Lewin, Trusts, Introd. 3. See also, *infra*, 378 n. 1, 380 n. 1. — ED.

SECTION V. (*continued*).

(*b*)[1] MARRIAGE OF CESTUI QUE TRUST. — DOWER.

BOTTOMLEY *v.* LORD FAIRFAX.

IN CHANCERY, 1712.

[*Reported in Precedents in Chancery*, 336.]

IN this case it was clearly agreed that if a husband before marriage conveys his estate to trustees and their heirs, in such manner as to put the legal estate out of him, though the trust be limited to him and his heirs, that of this trust estate the wife, after his death, shall not be endowed, and that this court hath never yet gone so far as to allow her dower in such case.[1]

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[1] Kent *v.* Reresby, Tothill, 99; Colt *v.* Colt, Ch. Rep. 254; Radnor *v.* Rotheram, Prec. Ch. 65; Att'y-Gen. *v.* Scott, Cas. t. Talb. 138; Chaplin *v.* Chaplin, 3 P. Wms. 229; Shepherd *v.* Shepherd, 3 P. Wms. 234, n. (D); Reynolds *v.* Massing, 1 Atk. 604 (cited); Godwin *v.* Winsmore, 2 Atk. 525; Dixon *v.* Saville, 1 Bro. C. C. 326; Curtis *v.* Curtis, 2 Bro. C. C. 630 (*semble*); Casborne *v.* Scarfe, 2 J. & W. 194; Burgess *v.* Wheate, 1 Eden, 197; Cornog *v.* Cornog, 3 Del. Ch. 407; Hamlin *v.* Hamlin, 19 Me. 141; Reed *v.* Whitney, 7 Gray, 533; Lobdell *v.* Hayes, 4 All. 187; Claiborne *v.* Henderson, 3 Hen. & M. 322 *Accord.* The widow of *cestui que trust* of a copyhold is entitled to freebench. Otway *v.* Hudson, 2 Vern. 583.

Dower in trust property is now given by statute in most jurisdictions. The old rule still prevails, however, in a few states. Cornog *v.* Cornog, 3 Del. Ch. 407; Bush *v.* Bush, 5 Del. Ch. 144; Lobdell *v.* Hayes, 4 All. 187; Hopkinson *v.* Dumas, 42 N. H. 296. But dower in an equity of redemption is commonly given even where there is no dower of a trust. In the District of Columbia the widow of a mortgagor gets no dower. *Re* Thompson, 6 Mackey, 536. In New York, dower in an equitable interest is allowed only when the husband retained the interest at his death. *Re* Ransom, 17 Fed. Rep. 331. Kenyon *v.* Kenyon (R. I. 1892), 24 Atl. R. 787, was an instance of hardship. The husband had an equitable life estate and a legal remainder in fee His widow, it was rightly decided, got nothing.

D'ARCY *v.* BLAKE.

IN IRELAND, IN CHANCERY, BEFORE LORD REDESDALE, C., MARCH 9, 1805.

[*Reported in* 2 *Schoales & Lefroy*, 387.]

IN this case it had been referred to the Master to inquire and report whether the defendant Margaret Blake was entitled to dower out of all or any, and which of the estates of her late husband, if not bound by a certain deed in the plaintiff's bill mentioned. It appeared that the estates in question were let at the time of the marriage upon leases for lives, which continued during the coverture. The Master reported that the defendant was not entitled to dower, to which report the defendant excepted.

Mr. Saurin, *Mr. Burston*, *Mr. Williams*, and *Mr. Lynch*, for the exception.[1]

The Attorney-General, *Mr. Burton*, and *Mr. Daniel*, against the exception.

LORD CHANCELLOR. The general principle on which courts of equity have proceeded in cases of dower is, that dower is to be considered as a mere legal right; and that equity ought not to create the right where it does not subsist at law; that therefore there can be no dower of an equity of redemption reserved upon a mortgage in fee, though there may of an equity of redemption upon a mortgage for a term of years, because in that case the law gives dower subject to the term. A court of equity will assist a widow by putting a term out of her way, where third persons are not interested.[2] But against a purchaser, a court of equity will not give that assistance, as in Lady Radnor *v.* Vandebendy.[3] The difficulty in which the courts of equity have been involved, with respect to dower, I apprehend, originally arose thus: They had assumed as a principle in acting upon trusts, to follow the law; and according to this principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts; and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting on the footing of dower, upon a contrary principle, and had supposed that by the creation of a trust the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion if courts of equity had followed their general rule with respect to trusts in the cases of dower. But the same objection did not apply to tenancy by the curtesy; for no person would purchase an estate subject to tenancy by the curtesy, without the concurrence of the person in whom that right was vested. This I take to be the true reason of the distinction between dower and tenancy by the curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of dower; but it was not necessary in the case of tenancy by the curtesy. Pending the coverture, a woman could not alien without her husband; and therefore nothing she could do could be understood by a purchaser to affect his interest: but where the husband was seised or entitled in his own right, he had full power of disposing, except so far as dower might attach; and the general opinion having long been that dower was a mere legal right, and that as the existence of a trust estate previously created prevented the right of dower attaching at law, it would also prevent the property from all claim of dower in equity; and many titles depending on this opinion, it was found that it would be mischievous in this instance to the general principle that equity should follow the law; and it has been so long and so clearly settled that a woman should not have dower in equity who is not entitled at law, that it would be shaking everything to attempt to disturb the rule. In point of remedy, a woman claiming dower may be assisted in equity: a court of equity will put out of her way a term which prevents her obtaining possession at law; but that is only as against an heir or volunteer, not a purchaser, the heir or volunteer being considered as claiming in no better right than she does. When, therefore, any question of dower has arisen in courts of equity, and doubts have been entertained of the title to dower, the constant practice in England has been to put the widow to bring her writ of dower at law. The courts will assist her in trying her right, and enjoying the benefit of it, if determined at law in her favor, by giving her a discovery of deeds, by ascertaining metes and bounds; and they do not require her to execute the writ with all the formalities necessary at law; and the right being acertained by judgment at law, will give her possession according to her right; but still they require that the question of her title to dower, if subject to doubt, should be determined at law. What was thrown out by Sir Joseph Jekyll in Banks *v.* Sutton,[1] has been long overruled.[2] The rule of courts of equity, so far as it excludes a widow from dower of an equitable estate against an heir or volunteer, goes perhaps beyond the reason of the rule. But I have called this subject to my recollection a good deal, by looking into the authorities since this case was first mentioned; and the decisions to the full extent are so old, so strong, and so numerous, so generally adopted in every book on the subject, and so considered as settled law, that it would be very wrong to attempt at this time to alter them. Nor do I think that the doubts which have been suggested with respect to an equitable estate can be fairly raised in this case, where the claim is of dower of estates leased for lives before the marriage, and continuing subject to such leases, at the death of the husband. Of those parts of his estate the late husband of the defendant Margaret Blake was not so seised as to entitle her to dower at law; and if equity were strictly to follow the law, she could have no claim in equity for dower of those estates. He had not such seisin as to entitle her to dower; and the exception must be therefore overruled.[1]

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[1] The arguments of counsel are omitted. — ED.

[2] Radnor *v.* Vandebendy, Prec. Ch. 65; Dudley *v.* Dudley, Prec. Ch. 241 *Accord.* — ED.

[3] Prec. Ch. 65, by the name of Lady Radnor *v.* Rotheram, Show. Parl. Cas. 96.

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[1] 2 P. Wms. 700.

[2] See Cox's note (1), 2 P. Wms. 719.

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[1] In Att'y-Gen. *v.* Scott, Cas. t. Talb. 138, Lord Talbot said, p. 139: "No dower was of a use before the statute (*a*), as appears from Vernon's Case, 4 Co. 1. And then how can she be dowable of a trust after the statute, since no difference can be assigned between a trust now and a use before the statute? And courts of equity must follow the same rules now as to trusts, as prevailed before the statute as to uses. How the difference now received, between tenant by the curtesy and tenant in dower, ever came to be established, I cannot tell; but that it is established is certain." — Ed.

(*a*) Y. B. 13 H. VII. 7–3; Crumwel *v.* Andros, 2 And. 69, 75 (*semble*); Vernon's Case, 4 Rep. 1 *b*; Doct. & Stud. Dial. II. c. 22; Chaplin *v.* Chaplin, 3 P. Wms. 229, 234; Preamble to Statute of Uses, 27 Hen. VIII. c. 10 *Accord.* — Ed.

SECTION V. (*continued*).

(b^2) MARRIAGE OF CESTUI QUE TRUST. — RIGHTS OF HER HUSBAND DURING COVERTURE.

SWEETAPPLE *v.* BINDON.

IN CHANCERY, BEFORE SIR NATHAN WRIGHT, K., FEBRUARY 9, 1705.

[*Reported in* 2 *Vernon*, 536.]

W. B. devised £300 to her daughter Mary, to be laid out by her executrix in lands, and settled to the only use of her daughter Mary and her children; and if she died without issue, the lands to be equally divided between her brothers and sisters then living. The plaintiff married Mary the legatee, and had issue by her; but she and her child being both dead, and the money not laid out in land, the bill was, that the plaintiff might either have the money laid out in lands, and settled on him for life, as being tenant by the curtesy, or in lieu of the profits of the lands might have the interest of the money during his life.

Per Cur. If it had been an immediate devise of land, Mary the daughter would have been, by the words in the will, tenant in tail, and consequently the husband would have been tenant by the curtesy; and in the case of a voluntary devise the court must take it as they found it, and not lessen the estate or benefit of the legatee; although upon the like words in marriage-articles it might be otherwise, where it appeared the estate was intended to be preserved for the benefit of the issue; and therefore decreed the money to be considered as lands, and the plaintiff to the interest or proceed thereof, for his life, as tenant by the curtesy.[1]

WATTS AND ANOTHER *v.* BALL AND ANOTHER.

IN CHANCERY, BEFORE LORD COWPER, C., HILARY TERM, 1708.

[*Reported in* 1 *Peere Williams*, 108.]

THE case in effect was: One seised of lands in fee had two daughters, and devised his lands to trustees in fee, in trust to pay his debts, and to convey the surplus to his daughters equally.

The younger daughter married and died, leaving an infant son and her husband surviving.

The eldest daughter brought a bill for a partition; and the only question was, whether the husband of the younger daughter should have an estate for life conveyed to him, as tenant by the curtesy?

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[1] Cunningham *v.* Moody, 1 Ves. 174; Dodson *v.* Hay, 3 Bro. C. C. 405 *Accord.* — ED.

The husband in his answer had sworn that he married the younger daughter upon a presumption that she was seised in fee of a legal estate in the moiety; that at the time of the marriage she was in the actual receipt of the profits of such moiety; and it was admitted that this trust was not discovered until after the death of the younger daughter, nor until it was agreed that a partition should be made.

Decreed by LORD CHANCELLOR, that trust estates were to be governed by the same rules, and were within the same reason, as legal estates; and as the husband should have been tenant by the curtesy, had it been a legal estate, so should he be of this trust estate; and if there were not the same rules of property in all courts, all things would be, as it were, at sea, and under the greatest uncertainty.

His Lordship added, that this being a case of some difficulty, he could have wished it had not come before him as a cause by consent; but his opinion was, that the husband ought to be tenant by the curtesy, and the rather, because it appeared that he upon his marriage did conceive and presume his wife to be seised of a legal estate in the moiety, and had reason to think so, she being in possession thereof.

Wherefore it was decreed that an estate for life in a moiety in severalty should be conveyed by the trustees to the husband, with remainder in fee to his son.

In this cause, *Mr. How* (who was for the husband) cited the case of Sweetapple *v.* Bindon, where money was devised to be laid out, for the benefit of a *feme sole* in the purchase of lands in fee; the *feme* married, and had issue, and died, the husband surviving; and decreed in equity that though the money was not invested in a purchase during the life of the wife, yet in regard, in this case, if it had been so laid out the husband would have been tenant by the curtesy, and that this was as land in equity, therefore the husband was equally entitled.[1]

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[1] Chaplin *v.* Chaplin, 3 P. Wms. 234 (*semble*); Att'y-Gen. *v.* Scott, Cas. T. Talb. 139 (*semble*); Casborne *v.* Scarfe, 1 Atk. 603; Parker *v.* Carter, 4 Hare, 400; Davis *v.* Mason, 1 Pet. 503, 508; Robison *v.* Codman, 1 Sumn. 121, 128; Philips *v.* Philips, 2 Duv. 549; Rawlings *v.* Adams, 7 Md. 26, 54; Houghton *v.* Hapgood, 13 Pick. 154; Gardner *v.* Hooper, 3 Gray, 398; Alexander *v.* Warrance, 17 Mo. 228; Baker *v.* Nall, 59 Mo. 268; Tremmel *v.* Kleiboldt, 6 Mo. Ap. 549; Senthill *v.* Robeson, 2 Jones Eq. 510 (*semble*); Lowry *v.* Steele, 4 Ohio, 170; Shoemaker *v.* Walker, 2 S. & R. 554; Chew *v.* Commissioners, 3 Rawle, 160; Dubs *v.* Dubs, 31 Pa. 154; Baker *v.* Heiskell, 1 Cold. 641; Norman *v.* Cunningham, 5 Grat. 63 *Accord.*

A husband of *cestui que use* was not entitled to curtesy. Brooke Abr. Feoff. al Uses, pl. 40; Chudleigh's Case, 1 Rep. 122 *a*; Gilbert Uses, 11, 171; Lewin Trusts, Introd. (7th ed.) 3. — ED.

APPLETON *v.* ROWLEY.

In Chancery, before Sir R. Malins, V. C., March 10, 1869.

[*Reported in Law Reports*, 8 *Equity*, 139]

This case came on upon further consideration.

Samuel Duffield, by his will, dated in March, 1813, devised and bequeathed all his real and personal estate to his wife Alice Duffield and three other persons, their heirs, executors, administrators, and assigns, upon trust to permit his wife to receive the clear rents, income, and profits arising from his landed estates and funded property for her life, and after her decease upon trust to sell the sixteen freehold houses therein designated, and invest the produce in government securities, and he charged the said sixteen houses or the produce upon the sale thereof with the payment of certain legacies, and the remainder or overplus which might arise from the sale of such sixteen houses he gave and bequeathed in equal moieties between Sarah Gaywood and Alice Key, as tenants in common, and their respective heirs or representatives. And upon further trust as to five other freehold houses after the death of his wife to stand possessed thereof unto and to the use of Alice Key, her heirs and assigns for ever, free from the control, intermeddling, debts, or engagements of any husband with whom she might intermarry, and that her receipt alone should be a full and effectual discharge to the trustees for the time being for all purposes and upon all occasions. But in the event of her dying without having any child or children, then to stand possessed of the said five houses unto and to the use of three persons therein named, their heirs and assigns, for ever, as tenants in common. And the residue of his real and personal estate the testator gave upon trust for his wife, her heirs, executors, administrators, and assigns absolutely, and to be conveyed and disposed of as she might think fit or direct.

Alice Key, a married woman, died after the institution of the suit, and there was one child of her marriage.

The first[1] question argued was whether the husband of Alice Key was entitled as tenant by the curtesy to the five freehold houses devised to trustees upon trust for Alice Key, her heirs and assigns, for ever, for her separate use.

Mr. Charles Hall, for the plaintiff, the husband of Alice Key.

Mr. Laing, for persons in the same interest.

Mr. Bazalgette, Q. C., for the infant, claimed adversely to the curtesy.

Sir R. Malins, V. C. The rules of this court are clear, that the husband is entitled to curtesy whenever the wife is, at law or in equity, seised of an estate of inheritance. This question arises in respect of the husband of Alice Key, who is said to be entitled to curtesy out of the five freehold houses devised to trustees to stand possessed thereof unto and to the use of Alice Key, her heirs and assigns for ever, for her sole and separate use. The devise, therefore, is to her in fee-simple, with a direction that the property shall be for her separate use.

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[1] Only so much of the case is given as relates to this question; the arguments of counsel are also omitted. — Ed.

The effect of the devise is to give her power to alienate the property without the concurrence of her husband. If she had conveyed it by deed, or devised it by will, the trustees would have been bound to convey the legal estate to any person taking under such deed or will. She had the whole equitable estate in fee-simple, and it being clear that curtesy attaches wherever the wife is entitled to a fee, why should not the husband have curtesy in this property?

The separate use clause is for the protection of the wife, and would have entitled her as against her husband to make an alienation. She has died without making any disposition of the property, and was seised of the equitable estate in possession. My opinion is, that the estate is subject to curtesy. It would be contrary to every principle that a clause introduced for the benefit and protection of the wife should prevent the husband from having his right to curtesy.

There is no doubt that the authorities are conflicting. In Roberts v. Dixwell,[1] the testator directed his trustees to convey one-fourth of his property to the use of his daughter for life for her separate use, and after her decease in trust for the heirs of her body. Lord Hardwicke expressed himself thus: "The next question will be, whether the devise to the wife for her separate use will bar the husband of his curtesy. I am of opinion it will not, because here is a sort of a seisin in the wife. My Lord Coke says, that to make a tenancy by the curtesy there ought to be a right in the husband inchoate in the life of the wife; but he does not say that he should be seised of the rents and profits. Therefore, I think if this had been an estate-tail, he would have been entitled to be tenant by the curtesy, notwithstanding this court, by their authority, might have prevented the husband from intermeddling with the rents and profits during the life of the wife. But, upon the whole, I am of opinion the wife could not take an estate in tail, but took an estate for life only." And, on the ground that the husband was absolutely excluded from all benefit in the estate, either in the life of the wife or after her decease, Lord Hardwicke held that the husband was excluded from the curtesy. Then there is the contrary opinion, expressed by Lord Hardwicke in Hearle v. Greenbank,[2] where the rents of the estate were to be applied to the separate use of the wife, and the trustees, who had the fee in all the real estate, were to permit the wife to dispose of it. There Lord Hardwicke decided that the husband could not be tenant by the curtesy, because the whole legal estate of inheritance was in the trustees.

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[1] 1 Atk. 607, 609.

[2] 3 Atk. 695, 716.

The true criterion is, whether the wife is seised of an equitable estate of inheritance. In Follett *v.* Tyrer,[1] the property was conveyed to trustees in trust for the separate use of the wife for life, with remainder as she should appoint, and in default of appointment, to her right heirs for ever. The wife died without exercising the power, and it was held that her husband was entitled to the curtesy. Then there is the recent case of Moore *v.* Webster,[2] where the real estate was limited to the separate use of the wife, and to be assigned and disposed of as she might think fit by deed or will; and Vice-Chancellor Stuart held that the husband was not entitled to curtesy, on the ground that he was totally excluded from the whole marital interest. I am unable to concur in that decision, for there the whole equitable fee was given to the wife.

I think, from a review of all the cases, and upon the sound principles of law, that wherever a wife is seised of an estate in fee-simple or fee-tail in possession, whether legal or equitable, the husband cannot be excluded from the curtesy; he will, therefore, in this case be entitled to this estate for life by the curtesy.[3]

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[1] 14 Sim. 125.

[2] Law Rep. 3 Eq. 267.

[3] Roberts *v.* Dixwell, 1 Atk. 609 (*semble*); Morgan *v.* Morgan, 5 Mad. 408; Follett *v.* Tyrer, 14 Sim. 125; Cooper *v.* McDonald, 7 Ch. D. 288 (*semble*); Eager *v.* Furnivall, 17 Ch. D. 115; Hope *v.* Hope, '92, 2 Ch. 336; Grimball *v.* Patton, 70 Ala. 626 (*semble*); Payne *v.* Payne, 11 B. Mon. 138; Tremmel *v.* Kleiboldt, 76 Mo. 255; Mullany *v.* Mullany, 3 Green, Ch. 16; Cushing *v.* Blake, 29 N. J. Eq. 399, 30 N. J. Eq. 689, 696; Clark *v.* Clark, 24 Barb. 581; Ege *v.* Medlar, 82 Pa. 86; Tillinghast *v.* Coggeshall, 7 R. I. 383; Harvey *v.* Heiskell, 1 Coldw. 641 *Accord.*

Hearle *v.* Greenbank, 3 Atk. 715 (overruled); Moore *v.* Webster, L. R. 3 Eq. 267 (overruled), *contra.*

An alienation of her inheritance by the wife, either by deed or will, deprives the husband of his curtesy. Cooper *v.* McDonald, 7 Ch. D 288; Sturmur *v* Sedgwick, 24 Ch. D 597; Pool *v.* Blakie, 53 Ill. 495; Steward *v.* Ross, 50 Miss. 776; Chapman *v.* Price, 83 Va. 392. But see *contra* Soltan *v.* Soltan, 93 Mo. 307.

It has been maintained by certain authorities that an express intention by the creator of the separate use to exclude the husband from curtesy is sufficient to bar his claim. Morgan *v.* Morgan, 5 Mad. 408 (*semble*); Rantenbusch *v.* Donaldson, (Ky. 1892) 18 S W. R. 636; Stokes *v.* McKibbin, 13 Pa. 267 (*semble*); Rigler *v.* Cloud, 14 Pa. 361. See also Dugger *v.* Dugger, 84 Va. 130. But this view is fully met by the following observations of Mr. Lewin in his Treatise on the Law of Trusts (9th ed.), 829: "It was observed by Sir John Leach that at law the husband could not be excluded from the enjoyment of property given to or settled upon the wife, but in equity he might; and that not only partially, as by a direction to pay the rents and profits to the separate use of his wife during coverture, but wholly by a direction that upon the death of the wife the inheritance should descend to the heir of the wife, and that the husband should not be entitled to be tenant of the curtesy: Morgan *v.* Morgan, 5 Mad. 411; but this doctrine may admit of question, as there appears no reason why a person should be able to exempt equitable any more than legal estates from the ordinary incidents of property. A declaration, for instance, by a settlor, that a trust should be inalienable or not available to creditors would be absolutely void. In the case of Bennet *v.* Davis, 2 P. Wms. 316, which is cited by Sir J. Leach for his position, the question discussed was not whether curtesy attached on an equitable estate, but whether an equitable estate arose. A testator had devised lands to his daughter, the wife of Bennet, for her separate use, exclusive of her husband, to hold the same

116 Me. 138

to her and her heirs, and that her husband should not be tenant by the curtesy, nor have the lands for his life in case he survived, but that they should upon his wife's death go to her heirs. It was contended that the wife could not be a trustee for herself, and that the husband could not be a trustee for the wife, they both being one person, and that, consequently, as there was no trustee, the husband was entitled to the estate beneficially. But the court held that the husband was a trustee for the wife, and observed: 'Though the husband might be tenant by the curtesy (viz. of the legal estate), yet he should be but a trustee for the heirs of the wife.' The remark certainly implies that on the death of the wife the husband would not be tenant by the curtesy of the equitable estate; but that question had not been adverted to at the bar, and apparently, from the context, was not under the consideration of the court. Even assuming the remark to have been made advisedly, the view of the court may have been that the curtesy of the husband was excluded on the ground now overruled, viz. that the trust being not simply for the wife and her heirs, but during the coverture for the separate use of the wife, and after her death for her heirs, there was not a sufficient seisin as regarded the husband for the curtesy to attach upon. See Hearle *v.* Greenbank, 3 Atk. 715, 716; Morgan *v.* Morgan, 5 Mad. 408." — Ed.

SECTION V. (*continued*).

[', 3] MARRIAGE OF CESTUI QUE TRUST. RIGHTS OF HUSBAND DURING COVERTURE.

WITHAM'S CASE.

IN CHANCERY, EASTER TERM, 1590.

[*Reported in Fourth Institute* 87.]

WITHAM'S CASE in the chancery was, that a term for years was granted to the use of a *feme sole*, she took husband and died; whether the husband should have the use, or the administrators of the *feme*, was referred to the judges; and by them it is resolved, that the administrators should have it, and not the husband, because that this trust of a *feme* was a thing in privity, and in nature of an action, for which no remedy was but by writ of *subpœna*. And so it was resolved by the justices in Waterhouse's Case, Hil. 8 [38?][1] Eliz. *Eborum*, for the trust runneth in privity in this case, and a husband should not be tenant by the curtesie of an use, nor the lord of the villain should have it at common law.[2]

SIR EDWARD TURNER'S CASE.

IN CHANCERY, IN THE HOUSE OF LORDS, TRINITY TERM, 1681.

[*Reported in* 1 *Vernon*, 7.[3]]

MEMORANDUM; that about Michaelmas last it was adjudged in an appeal in the House of Lords, in the case of Sir Edward Turner, that a term being assigned in trust for a *feme* by her former husband, and she afterwards intermarrying with the late Lord Chief Baron Turner, who aliened the term, that the same was well passed away, and that the husband might dispose thereof; and my Lord Chancellor's decree was thereupon reversed.[4] But it was agreed, that where a term is assigned in trust for a *feme* by the privity and consent of her husband, there without doubt the husband cannot intermeddle or dispose of it.

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[1] Wytham *v.* Waterhouse (H. 38 Eliz), Cro. El. 466, Popham, 106, s. c. — ED.

[2] Co. Litt. 351, a; Anon. Jenk. 6 Cent. 245 pl. 30, Dy. 369 a, s. c.; Denie's Case, Lane, 113, cited; Hunt *v.* Baker, Freem. Ch. 62 *Accord.*

But in Rex *v.* Holland (1647), Aleyn, 15 Witham's case being cited, "Rolle, J., said that it hath been since resolved that the husband shall have it in this case." See in agreement with the opinion of Rolle J., *Re* Bellamy, 25 Ch. D. 620; Archer *v.* Lavender, Ir. R. 9 Eq. 220; 1 Preston, Abst. 343; Lewin, Trusts (9th ed.), 842. — ED.

[3] 4 Hare, 3, n. (*b*), s. c. — ED.

[4] Wikes's Case, Lane, 54; 1 Roll. Abr. 343, s. c.; Bullock *v* Knight, 1 Ch. Ca. 266; Pitt *v.* Hunt, 1 Vern. 18, Sanders *v.* Page, 3 Ch. Rep. 223; Packer *v.* Wyndham, Prec. Ch. 418, 419; Roupe *v.* Atkinson, Bunb. 162; Jewson *v.* Moulton, 2 Atk. 417, 421;

ELWIN *v.* WILLIAMS.

IN CHANCERY, BEFORE SIR L. SHADWELL, JANUARY 23, 24, APRIL, 1843.

[*Reported in* 13 *Simon*, 309.]

UNDER the will of F. Potter, who died in 1799, one moiety of his residuary personal estate, consisting of stock in the funds &c., was vested in trustees, in trust for his daughter Sarah, the wife of Robert Ellison, for her separate use, for her life, and, after her death, in trust for Sarah, her daughter, absolutely, but subject to the payment of one half of the income to Robert Ellison for his life, if he survived his wife.

In October 1812 an indenture (being articles of agreement in contemplation of the marriage of Sarah, the daughter, *then an infant of the age of nineteen*, with Ralph Nicholson) was made between Nicholson of the first part, Ellison and wife of the second part, Sarah, the daughter, of the third part, and certain trustees of the fourth part, whereby it was agreed between the parties, and Sarah, the daughter, for herself,

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Incledon *v.* Northcote, 3 Atk. 430, 435; Macaulay *v.* Phillips, 4 Ves. 15, 19; Franco *v.* Franco, 4 Ves. 515, 528; Mitford *v.* Mitford, 9 Ves. 87, 98; Donne *v.* Hart, 2 Russ. & M. 360; Hanson *v.* Keating, 4 Hare, 1; Duberley *v.* Day, 16 Beav. 33, 41.

In Duberley *v.* Day, Sir J Romilly, M. R., said, p. 41: "It is quite settled, that at law a husband may dispose of the wife's term which is vested in him, whether the wife's beneficial interest in it is to arise hereafter or immediately. In Donne *v.* Hart, 2 Russ. & M. 360, the Master of the Rolls [Sir John Leach], decided, that there is no difference in equity between the legal interest in a term and the trusts of a term, and held that the assignment by the husband of the reversion of the wife in a chattel real was a good and effectual disposition of it, and bound the wife, who survived the husband." See also *Re* Bellamy, 25 Ch. D. 620. In the case before him, the learned judge decided that the husband had not the power to dispose of the trust term of the wife, inasmuch as by the limitations to her it could not in any event vest in possession during the life of the husband.

The husband's rights in the trust property of his wife in lands of freehold or inheritance are well stated in the following extract from Lewin's Trusts (7th ed.), 640: "The case of the wife's equitable estate in lands of freehold or inheritance, presents in the main the same general similarity to the case of her legal estate in like lands, as has been noticed in respect of chattels real. Thus the husband without the wife can, in the case of the equitable as in that of the legal interest, convey an estate for the joint lives of himself and his wife, (*a*) or for his own life after issue born. So he and his wife conjointly can, by deed acknowledged by the latter under the Fines and Recoveries Act, dispose of the equitable and of the legal interest; and can bar an equitable entail as they might a legal entail, by deed enrolled in chancery." — ED.

(*a*) As to the legal estate, see Robertson *v.* Norris, 11 Q. B. 916.

her heirs, &c., and Nicholson, for himself, his heirs, &c., and for his intended wife, covenanted with the trustees that in case the marriage should take effect, they would, as soon as conveniently might be after Sarah should attain 21 or die under that age, assign the before-mentioned moiety of the testator's residuary estate to the trustees, in trust for Nicholson and his intended wife for their lives, successively, and, after their deaths, in trust for their children.

The marriage was solemnized shortly after the date of the articles, and Mrs. Nicholson attained 21 in August 1815. In March 1821 her mother died. In March 1823, a settlement was made for the purpose of carrying the articles into effect, to which Mr. and Mrs. Nicholson and the trustees were the only parties. In September 1838, Mr. Nicholson died, leaving his wife and nine children by her surviving. In July 1839 Mr. Ellison died.

At Mr. Ellison's death the stock in the funds, which formed part of the testator's residuary estate, remained standing *in the names of the trustees of the will.*

The bill was filed by the trustees of the settlement, against the trustees of the testator's will, and Mrs. Nicholson and her children, and certain other persons, stating that Mrs. Nicholson alleged that, *as she was an infant when the articles on her marriage were executed, she was not bound thereby*, and that she was entitled to have a moiety of the stock which had formed part of the testator's residue, transferred to her; and stating also that Mrs. Nicholson's children made claims adverse to their mother; and praying that the rights and interests of the plaintiffs, as the trustees of the articles, and of the several defendants, to and in the property in question, might be ascertained and declared by the Court.

Mr. Stuart and *Mr. Younge* appeared for the plaintiffs.

Mr. Teed and *Mr. Rogers*, for Mrs. Nicholson.

Mr. Anderdon and *Mr. Spurrier*, for some of Mrs. Nicholson's children.

The VICE-CHANCELLOR: Before I part with this case, I will look through all the authorities from the beginning to the end. I confess that at present I have a strong impression on my mind that there is no case in which the Court has held the wife's right by survivorship to be barred, where the husband has, for a valuable consideration, assigned his wife's equitable *chose in action*, which was capable of being reduced into possession at the time, and has died before the assignee has attempted to reduce it into possession.

The VICE-CHANCELLOR: After repeated discussion, in the case of Purdew *v.* Jackson, before Sir Thomas Plumer and by Sir Thomas himself, he said: "After this repeated consideration of the subject, I still continue of opinion that all assignments made by the husband, of the wife's outstanding personal chattel, which is not or cannot be then reduced into possession, whether the assignment be in bankruptcy, or under the Insolvent Acts, or to trustees for payment of debts, or to a purchaser for valuable consideration, pass only the interest which the husband has subject to the wife's legal right by survivorship."[1]

In that case, Mrs. Bolton being entitled to a share of £3 per cents. after the death of Isabella Purdew, she and her husband executed an assignment of her share, to Rose, for valuable consideration. Then Bolton, the husband, died. Afterwards, Isabella Purdew died; and the question was whether Rose was entitled to the share, or Mrs. Bolton and those who claimed under her. And Sir Thomas Plumer, in conformity with what he had before said, decided that Rose was not entitled, but that the share belonged to Mrs. Bolton and those who claimed under her.

Precisely the same question arose in Honner *v.* Morton,[2] and the present Lord Chancellor decided in the same way. Upon the question that arose in those two cases I must consider the law as settled.[3]

In the course of the first argument in Purdew *v.* Jackson, the Master of the Rolls put this question: "Is there any case in which, the husband having assigned the wife's present *chose in action* and having died before the assignee obtained possession of it, the assignee prevailed over the surviving wife."[4] The leading counsel on both sides, one of whom was the present Lord Chancellor of Ireland, said: "We believe that such a case has not occurred." A note to the report seems to call in question the accuracy of that answer, and it refers to the case of The Earl of Salisbury *v.* Newton and to the case of Bates *v.* Daudy, of which, besides the report in Atkyns, one statement is given in a note to Purdew *v.* Jackson, at page 33, and another in a note to Honner *v.* Morton, at page 72. It appears, from the report of The Earl of Salisbury *v.* Newton, in 1 Eden, that the only point made by the counsel for the widow, was that she was entitled to have a settlement; and, as to Bates *v.* Daudy, Lord Lyndhurst, in 3 Russ. p. 72, observes that no doubt could be entertained as to the husband's power over the property: and the application of that case to the present question, rests, not on the decree, but on a *dictum* which was wholly unnecessary for the decision of the actual points which were before the Court: so that the answer of the counsel was, in substance, correct. As to the case of Lord Carteret *v.* Paschal,[5] on which Mr. Anderdon seemed to lay great stress, it actually was decided on the ground, not that the husband could assign his wife's *chose in action*, but that he might assign her interest in land in the nature of an equitable extent under Lord Cowper's decree. And it is also observable, from what is stated on page 199, that Lord King appeared to be of opinion that if the wife's *chose in action* was not reduced into possession during the husband's life, it survived to her as against his assignee.

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[1] 1 Russ. 70.

[2] 3 Russ. 65.

[3] Hornsby *v.* Lee, 2 Med. 16; Purdew *v.* Jackson, 1 Russ. 1; Honner *v.* Morton, 3 Russ. 65; Ashby *v.* Ashby, 1 Coll. 553; Stiffe *v.* Everitt, 1 M. & Cr. 37; Harley *v.* Harley, 10 Hare, 325; Heath *v* Lewis, 4 Giff. 665; Baldwin *v.* Baldwin, 5 DeG. & Sm. 319, *Re* Insole, 35 Beav. 92, Swift *v* Werman, 10 Eq. 15; Box *v.* Box. 6 Ir. Eq. 174 *Accord.* In the United States, also, it became the rule that the assignment of a wife's reversionary interest in a legal chose in action does not, of itself, destroy her right of survivorship. Lynn *v.* Bradley, 1 Met. (Ky.) 232; Wood *v.* Simmons, 20 Mo. 363; Needles *v.* Needles, 7 Oh. St. 432; Matteney *v.* Guess, 2 Hill, Ch. 63; Browning *v.* Headley, 2 Rob. Va. 340. But see *contra*, Woelper's App. 2 Barr, 71. — ED.

[4] 1 Russ. 19.

[5] 3 P. W. 197.

It is useless to be always travelling over the same ground. I consider the principle laid down by Sir Thomas Plumer and twice affirmed by the Lord Chancellor, to be decisive of the present question. Whether the husband dies in the lifetime of the tenant for life, whereby the *chose in action* cannot, as against the wife, be reduced into possession, or whether he survives and dies before it is reduced into possession, the same result must, in my opinion, follow: and the consequence is that, in the present case, a declaration must be made that Mr. Nicholson's covenant, which might operate as an assignment, does not now affect that portion of the *choses in action* of his wife, which was not reduced into possession in his lifetime.[1]

ANNE MILLER *v.* LEMUEL BINGHAM AND OTHERS, EXECUTORS.

IN THE SUPREME COURT, NORTH CAROLINA, JUNE, 1841.

[*Reported in* 1 *Iredell Equity*, 423.]

THIS was a case transmitted by consent from the Court of Equity of Davie County, at Fall Term, 1840, to the Supreme Court for hearing. The pleadings and facts are set forth in the opinion of this court.

D. F. Caldwell and *Iredell* for the plaintiff.

Waddell and *Barringer* for the defendants.

DANIEL, J. Maxwell Chambers, the father of the plaintiff, bequeathed as follows: "I give and bequeath to my son, Edward Chambers, as trustee of my daughter, Anne Chambers (wife of Henry Chambers), the following negroes: Beck, &c. to have and to hold to my said son, Edward, in trust, and for the benefit of my daughter, Anne Chambers, and her heirs forever. It is my wish and request that my son

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[1] Michelmore *v.* Mudge, 2 Giff. 183; Prole *v.* Soady, 3 Ch. 220 *Accord.* In this country the authorities are divided as to whether the assignment by the husband of his wife's *present* legal *chose in action* will defeat her right of survivorship. The wife's right was established, as in the principal case, in George *v.* Goldsby, 23 Ala. 226; State *v.* Robertson, 5 Harringt. 201; Arrington *v.* Yarborough, 1 Jones, Eq. 72; Bugg *v.* Franklin, 4 Sneed, 129 (*semble*); 1 Bishop, Mar. Wom. §§ 145–155.

But see *contra*, Tuttle *v.* Fowler, 22 Conn. 58; Wright *v.* Arnold 14 B. Mon. 638; Lynn *v.* Bradley, 1 Met. (Ky.) 232 (*semble*); Schuyler *v.* Hoyle, 5 Johns. Ch. 196 (*semble*); Westervelt *v.* Gregg, 12 N. Y. 200, 205 (*semble*); Siter's Case, 4 Rawle, 468; Tritt *v.* Colwell, 31 Pa. 228; Mattheney *v.* Guess, 2 Hill, Ch. 63 (*semble*); Hill *v.* Townsend, 24 Tex. 575; Browning *v.* Headley, 2 Rob. Va. 340. — ED.

Edward will pay over to my daughter Anne, the profits arising from the said negroes, semi-annually, for her support and comfort." In a codicil to the will, the testator says, "My intention in the devise of the five negroes, to-wit, Beck, &c. to my son, Edward Chambers, as trustee of my daughter, Anne Chambers, is this: I give the five negroes, to-wit, Beck, &c. to Edward Chambers to hold in trust (and for the *sole benefit* of my daughter Anne, to support her during her life,) with the profits arising from the labor and hire of the said five negroes, and their increase. And if my daughter Anne should have lawful issue living, at the time of her death, then I devise and order that the said Edward Chambers, trustee of my said daughter Anne, shall deliver and convey absolutely, at the death of my said daughter, the said five negroes and increase, to the said lawful issue of my said daughter Anne, living at the time of her death. And if my daughter, Anne Chambers, should die without having issue, that then my son Edward shall convey the said five negroes and increase in equal shares to my heirs, or shall sell the negroes and divide the money in equal proportions among my heirs." Henry Chambers died, and his widow, the said Anne, married George Miller. The trustee died, and George Miller was appointed trustee by the Court of Equity, and took into his possession the said slaves. George Miller then died, and the defendants are his executors. Anne, the widow, claiming as *cestui que trust*, has filed this bill, for an account of the rents and hires of the said slaves, since the death of Miller, her last husband. The defendants have answered and claim the rents and hires of the negroes, as belonging to the estate of their testator.

That the slaves were well settled by the will to the separate use of Anne Chambers, and excluded any right of her then husband Henry Chambers, is very clear. Davis *v.* Cain;[1] Rudisill *v.* Watson.[2] But there is nothing in the will of Maxwell Chambers to show, that he anticipated a second marriage of his daughter, and he did not attempt to provide against such a contingency. The equitable interest in the slaves was given to the plaintiff for life. In this court the trust in a thing is the estate in that thing. The plaintiff, therefore, had a right to make an assignment of her interest in the slaves; on her second marriage, therefore, her interest passed to her husband. The second husband took the slaves into his possession. If, however, he had not taken them into his actual possession, and they had been in the possession of any other trustee under the will, still such a possession would not have been adverse to the husband; for the actual possession of the trustee is but considered as that of the person beneficially entitled; indeed the estate of the trustee exists entirely for the benefit of the *cestui que trust*. Where the trust is express, as in this case it is, there can be no adverse possession between the trustee and *cestui que trust*. It is not, however, of course, to divest the trustee of the management of the trust property, and to deliver the possession to the *cestui que trust* for life. It must depend on the intention of the settler, or him, by whom the trust was created. Tidd *v.* Lister;[1] Dick *v.* Pitchford.[2] A chose in the possession of the trustee of the *feme*, therefore, is not a *chose in action*, but it is a chose in possession, and will on her marriage (if a chattel) pass to her husband,[3] Granbery *v.* Mhoon;[4] Pettijohn *v.* Beasley.[5] A trust is not, as it was formerly held, a *chose in action*, but a present interest, an estate in possession. Mitford *v.* Mitford;[6] Burgess *v.* Wheate.[7] Lewin on Trusts, 523. The circumstance of the trustee being directed to pay the rents and hires *semi-annually* does not alter the case. In Benson *v.* Benson,[8] the testator directed the interest of £10,000 to be for the separate use of his daughter Jane Lane, the wife of J. Lane, for her life, free from the debts of her husband, to be paid to her at the end of every six months. The husband died and his widow married again. *Held*, that the trust for her separate use ceased on the death of her first husband, and that the second husband was entitled to the interest. The same doctrine was laid down by the court in Knight *v.* Knight.[9] These two cases are decisive against the plaintiff on all the points in the case. The bill must be dismissed with costs.

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[1] 1 Ired. Eq. Rep. 304.

[2] 2 Dev. Eq. Rep. 430.

PER CURIAM. *Bill dismissed with costs.*

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[1] 5 Mad. Rep 429.

[2] 1 Dev. & Bat. 480.

[3] Murray *v.* Elibank, 10 Ves. 84, 90 (*semble*); Molony *v.* Kennedy, 10 Sim. 254; Osborn *v.* Morgan, 9 Hare, 432; Widgery *v.* Tepper, 7 Ch. Div. 493; Branch Bank *v.* Wilkins, 7 Ala. 589; Lenoir *v.* Rainey, 15 Ala. 667; Lindsay *v.* Harrison, 8 Ark. 302; Pope *v.* Tucker, 23 Ga. 484; Murphy *v.* Grice, 2 Dev. & B. (Eq.) 199; Beall *v.* Darden, 4 Ired. Eq. 76 *Accord.*

In Osborn *v.* Morgan, *supra*, Sir G. J. Turner, V. C., said, p. 433: "Marriage is a gift to the husband of all the personal property to which the wife is entitled in possession, and of all the personal property of which she may become entitled, subject only to the condition of reducing it into possession during the coverture; and I am aware of no distinction in this respect between property to which the wife is entitled in equity, and property to which she is entitled at law. Nor upon principle can there be any such distinction, the rule resting as I conceive upon this, — that the husband and wife are in law one person, — a rule which prevails in equity as much as at law." See also Lewin, Trusts (9th ed.) 833. — ED.

[4] 1 Dev. 456.

[5] 4 Dev. 512.

[6] 9 Ves. 98, 99.

[7] 1 Eden, 223, 224.

[8] 6 Sim. 126.

[9] 6 Sim. 121.

SECTION VI.

By Bankruptcy.

(*a*) BANKRUPTCY OF THE TRUSTEE.

EX PARTE CHION.

IN CHANCERY, BEFORE LORD PARKER, C., TRINITY TERM, 1721.

[*Reported in* 3 *Peere Williams,* 187 *note* (*A*).]

A TRADER in London having money of J. S. (who resided in Holland) in his hands, bought South Sea stock, as factor for J. S., and took the stock in his own name, but entered it in his account book, as bought for J. S., after which the trader became bankrupt. Determined, that the trust stock was not liable to the bankruptcy. By the Lord PARKER, who said it would lessen the credit of the nation to make such a construction.[1]

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[1] Scott *v.* Surman, Willes, 400, 402 (*semble*); Carpenter *v.* Marnell, 3 B. & P. 40; *Ex parte* Dumas, 2 Ves. 582; Winch *v.* Keeley, 1 T. R. 619; Gladstone *v.* Hadwen, 1 M. & S. 517; *Ex parte* Gennys, Mont. & M, 258; *Ex parte* Painter, 2 D. & C. 584; Leslie *v.* Gutherie, 1 B. N. C. 697; Dangerfield *v.* Thomas, 9 A. & E. 292; Parnham *v.* Hurst, 8 M. & W. 743; Boddington *v.* Castelli, 1 E. & B. 879; Westoby *v.* Day, 2 E. & B. 605, 624; Houghton *v.* Koenig, 18 C. B. 235; Fleeming *v.* Howden, L. R. 1 Sc. Ap. 372; St. 32 & 33 Vict. c. 71, § 15; U. S. Rev. St. § 5053; Hosmer *v.* Jewett, 6 Ben. 208; Butler *v.* Merchants' Co., 14 Ala. 777, 798; Boon *v.* Stone, 8 Ill. 537; Rhoades *v.* Blackiston, 106 Mass. 334; Faxon *v.* Folvey, 110 Mass. 392; Chace *v.* Chapin, 130 Mass. 128; Kip *v.* Bank of N. Y., 10 Johns. 63; Dexter *v.* Stewart, 7 Johns. Ch. 52; Hopkins *v.* Banks, 7 Cow. 650; Ontario Bank *v.* Mumford, 2 Barb. Ch. 596; Blin *v.* Pierce, 20 Vt. 25 *Accord.*

Similarly the assignees of a bankrupt executor do not take the legal title to the assets of the testator. *Ex parte* Ellis, 1 Atk. 101; *Ex parte* Butler, 1 Atk. 210, 213; Note per Lord Mansfield, 3 Burr. 1369; Farr *v.* Newman, 4 T. R. 629, per Grose, J.; Viner *v.* Cadell, 3 Esp. 88.

If a bankrupt who holds the legal title to property has also a share in the beneficial interest therein, the legal title, it is said, passes to his assignee in bankruptcy. Burn *v.* Carvalho, 4 B. & Ad. 382; 1 A. & E. 883; 4 M. & Cr. 695, s. c.; Leslie *v.* Guthrie, 1 B. N. C. 697 (*semble*); Dangerfield *v.* Thomas, 9 A. & E. 292 (*semble*); Parnham *v.* Hurst, 8 M. & W. 743 (*semble*); Boddington *v.* Castelli, 1 E. & B. 879 (*semble*); Rhoades *v.* Blackiston, 106 Mass. 334 (*semble*); Swepson *v.* Rouse, 65 N. Ca. 34. But this rule should not apply where the bankrupt is expressly a trustee. Lewin, Trusts (7th ed.), 220, 221; Webster *v.* Scales, 4 Doug. 7.

Wherever the assignee of a bankrupt trustee does acquire the legal title, he takes it of course subject to the same equities to which it was subject in the hands of the trustee. Taylor *v.* Wheeler, 2 Vern. 564; Tyrrell *v.* Hope, 2 Atk. 558; *Ex parte* Coysegame, 1 Atk. 192; *Ex parte* Dumas, 2 Ves. 582, 585; Hinton *v.* Hinton, 2 Ves. 631, 633; Bowles *v.* Rogers, 6 Ves. 95, n. (55); Mitford *v.* Mitford, 9 Ves. 87, 100; Mestaer *v.* Gillespie, 11 Ves. 621, 624; *Ex parte* Hanson, 12 Ves. 346, 349; *Ex parte* Herbert, 13 Ves. 183, 188; Grant *v.* Mills, 2 V. & B. 306, 309; Waring *v.* Coventry, 2 M. & K. 406; Jones *v.* Mossop, 3 Hare, 568, 572; Frith *v.* Cartland, 2 H. & M. 417; Fleeming *v.* Howden, L. R. 1 Sc. Ap. 372; *Ex parte* Rabbidge, 8 Ch. D. 367; Harris *v.* Truman, 7 Q. B. D. 340, 356; Cook *v.* Tullis, 18 Wall. 332; Yeatman *v.* Savings Inst., 95 U. S. 767; Stewart *v.* Platt, 101 U. S. 731; Hanselt *v.* Harrison, 105 U. S. 401; Scammon *v.* Bowers, 1 Hask 496; Williamson *v.* Colcord, 1 Hask 620; Exchange Bank *v.* Stone, 80 Ky. 109; Chace *v.* Chapin, 130 Mass. 128; Holmes Winchester, 133 Mass. 140; Sibley *v.* Quinsigamond Bank, 133 Mass. 515; Low *v.* Welch, 139 Mass. 33; Smythe *v.* Sprague, 149 Mass. 312; *Re* Howe, 1 Paige, 125, 128 Ludwig *v.* Highley, 5 Barr, 132, 138 (*semble*).

The rule is the same where a trustee makes an assignment of trust property for the benefit of his creditors. Frow *v.* Downman, 11 Ala. 880; Walker *v.* Miller, 11 Ala. 1067; Willis *v.* Henderson, 5 Ill 13; O'Hara *v.* Jones, 46 Ill. 288; Roberts *v.* Corbin, 26 Iowa, 315; Kayser *v.* Heavenrich, 5 Kan. 324, 340; Corn *v.* Sims, 3 Met. (Ky.) 391; Bridgeford *v.* Barbour, 80 Ky. 529; Tyler *v.* Abington, 65 Md. 18; Clarke *v.* Flint, 22 Pick. 231; Chace *v.* Chapin, 130 Mass. 128; Pierson *v.* Manning, 2 Mich. 445 (overruling Hollister *v.* Loud, 2 Mich. 309); Flanigan *v.* Lampman, 12 Mich. 61; Brown *v.* Brabb, 67 Mich. 17; Paine *v.* Aberdeen Co., 60 Miss. 360; Peet *v.* Spencer, 90 Mo. 384; Haggerty *v.* Palmer, 6 Johns. Ch. 437; *Re* Howe, 1 Paige, 125; Slade *v.* Van Vechten, 11 Paige, 21; Griffin *v.* Marquardt, 17 N. Y. 28; Van Heusen *v.* Radcliff, 17 N. Y. 580 (overruling opinion of Kent, C., in Dey *v.* Dunham, 2 Johns. Ch. 182, 188); Bliss *v.* Cottle, 32 Barb. 322; Reed *v.* Sands, 37 Barb. 185; Coates *v.* First Bank, 91 N. Y. 20; Arnold *v.* Morris, 7 Daly, 498; Kraft *v.* Dulles, 2 Cincin. S. C. R. 116; Morgan *v.* Kinney, 38 Oh. St. 610; Manning *v.* Purcell, 46 Oh. St. 102; Mellon's App., 32 Pa. 121; Lancaster Bank *v.* Huver, 114 Pa. 216; Williams *v.* Winsor, 12 R. I. 9; Plumkett *v.* Carew, 1 Hill, Ch. 169; Rohrbough *v.* Leopold, 68 Tex. 254. But see *contra*, Wickham *v.* Martin, 13 Grat. 427; Evans *v.* Greenhow, 15 Grat. 153.

The possession of trust property by the trustee does not bring it within the "order and disposition" clause of the English Bankruptcy Acts. See authorities cited *supra* p. 277, n. 4. — ED.

SECTION VI. (*continued.*)

(*b*) BANKRUPTCY OF THE CESTUI QUE TRUST.

BRANDON *v.* ROBINSON.

In CHANCERY, BEFORE LORD ELDON, C., DECEMBER 18, 1811.

[*Reported in* 18 *Vesey*, 429.[1]]

THE bill stated that Stephen Goom, by his will, dated the 1st of August, 1808, devised and bequeathed to the defendants Robinson and Davies all his real and personal estates upon trust to sell, and to divide or otherwise apply the produce to the use of all and every his child or children, living at his decease, in equal proportions; deducting from the share of Thomas Goom the sum of £500 which had been advanced to him, and from the share of William Goom what should be due from him to the testator at his decease, — the said sums so to be deducted to be divided equally among the other children; and he declared his will, that the said several legacies, shares, and eventual interests of such of the legatees as at the time of his decease should have attained the age of twenty-one should be considered as vested interests; and, if there should be but one survivor, upon trust to pay and transfer the same unto such only survivor, his or her executors, &c., for his or her own use, subject nevertheless to such directions as after mentioned in respect to the shares or interests of such of the said legatees as were females, and also in respect to the share and interest of the said Thomas Goom: and he directed that the eventual share and interest of his said son Thomas Goom, of and in his estate and effects, or the produce thereof, should be laid out in the public funds or in government securities at interest by and in the names of his said trustees, &c., during his life; and that the dividends, interest, and produce thereof, as the same became due and payable, should be paid by them from time to time into his own proper hands, or on his proper order and receipt, subscribed with his own proper hand, to the intent the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof: and that upon his decease the principal of such share, together with the dividends and interest and produce thereof, should be paid and applied by his trustees or executors, their heirs, executors, &c., unto and amongst such person or persons as in a course of administration would become entitled to any personal estate of his said son Thomas Goom, and as if the same had been personal estate belonging to him, and he had died intestate.

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[1] 1 Rose, 197, s. c. — ED.

The bill further stated, that after the death of the testator his son Thomas Goom, having attained the age of twenty-one, became a bankrupt. The plaintiff was the surviving assignee under the commission; and the bill prayed an execution of the trusts of the will and an account, that the estates may be sold, and the clear residue ascertained, and that the plaintiff may receive the benefit of such part or share thereof, or of the interest therein, as he shall be entitled to as assignee under the commission.

To this bill the defendants, the trustees, put in a general demurrer.

Mr. Hart and *Mr. Horne*, in support of the demurrer.

Mr. Leach and *Mr. Roupell*, for the plaintiff, gave up the claim to the principal.[1]

THE LORD CHANCELLOR [ELDON]. There is no doubt that property may be given to a man until he shall become bankrupt.[2] It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life-estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life-estate, neither the man nor his assignees can have it beyond the period limited.

In the case of Foley *v.* Burnell,[3] this question afforded much argument. A great variety of clauses and means was adopted by Lord Foley with the view of depriving the creditors of his sons of any resort to their property; but it was argued here, and, as I thought, admitted, that if the property was given to the sons, it must remain subject to the incidents of property, and it could not be preserved from the creditors, unless given to some one else.

So the old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands, and upon her own receipt only; yet this court always said she might dispose of that interest,[4] and her assignee would take it; as, if there was a contract, entitling the assignee, this court would compel her to give her own receipt, if that was necessary to enable him to receive it. It was not before Miss Watson's Case that these words, "not to be paid by anticipation," &c., were introduced. I believe these were Lord Thurlow's own words, with whom I had much conversation upon it. He did not attempt to take away any power the law gave her, as incident to property, which, being a creature of equity, she could not have at law; but as under the words of the settlement it would have been hers absolutely, so that she could alien, Lord Thurlow endeavored to prevent that by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation; reasoning thus, that equity, making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it: but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different.

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[1] The arguments of counsel are omitted. — ED.

[2] Manning *v.* Chambers, 1 De G. & Sm. 282; Sharp *v.* Cosserat, 20 Beav. 470; Rochford *v.* Hackman, 9 Hare, 475; Joel *v.* Mills, 3 K. & J. 458; Hatton *v.* May, 3 Ch. D, 148; *Re* Bedson's Trusts, 28 Ch. D. 523; Nichols *v.* Eaton, 91 U. S. 716; Bull *v.* Ky. Bank (Ky., 1890), 14 S. W. R. 425; Warner *v.* Rice, 66 Md. 436, 440; Bramhall *v.* Ferris, 14 N. Y. 41; Wieting *v.* Bellinger, 50 Hun, 324, 329; Tillinghast *v.* Bradford, 5 R. I. 205; Heath *v.* Bishop, 4 Rich. Eq. 46 *Accord.*

Conf. Davidson *v.* Chalmers, 33 Beav. 653 (but see State Bank *v.* Forney, 2 Ired. Eq. 181).

See also *Re* Jones's Will, 23 L. T. Rep. 211; Metcalfe *v.* Metcalfe, 43 Ch. D. 633. — ED.

[3] 1 Bro. C. C. 274.

[4] Pybus *v.* Smith, 1 Ves. Jr. 189; 3 Bro. C. C. 340. See the notes, 1 Ves. Jr. 194; 5 Ves. 17.

This is a singular trust. If upon these words it can be established that he had no interest, until he tenders himself personally to the trustees to give a receipt, then it was not his property until then; but if personal receipt is in the construction of this court a necessary act, it is very difficult to maintain that if the bankrupt would not give a receipt during his life, and an arrear of interest accrued during his whole life, it would not be assets for his debts. It clearly would be so.

Next, is there in this will enough to show that, as this interest is not assignable by way of anticipation of any unreceived payment, therefore it cannot be assigned and transferred under the commission of bankruptcy? To prevent that it must be given to some one else; and unless it can be established that this by implication amounts to a limitation, giving this interest to the residuary legatee, it is an equitable interest, capable of being parted with. The principal, at the death of the bankrupt, will be under quite different circumstances. The testator had a right to limit his interest to his life; giving the principal to such person as may be his next of kin at his death, to take it as the personal estate, not of the son, but of him the testator, — as if it was the son's personal estate, but as the gift of the testator.

The demurrer must, upon the whole, be overruled.[1]

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[1] Graves *v.* Dolphin, 1 Sim. 66; Green *v.* Spicer, 1 Russ. & M. 395; Piercy *v.* Roberts, 1 M. & K. 4; Snowdon *v.* Dales, 6 Sim. 524; Younghusband *v.* Gisborne (questioning Twopenny *v.* Peyton, 10 Sim. 487); Rippon *v.* Norton, 2 Beav. 63; Page *v.* Way, 3 Beav. 20; Lord *v.* Bunn, 2 Y. & C. C. C. 98; Kearsley *v.* Woodcock, 3 Hare, 185; Rochford *v.* Hackman, 9 Hare, 475, 480 (*semble*); Wallace *v.* Anderson, 16 Beav. 533; Sanford *v.* Lackland, 2 Dill. 6 (*semble*); Rugely *v.* Robinson, 10 Ala. 702; Robertson *v.* Johnston, 36 Ala. 197; Smith *v.* Moore, 37 Ala. 327; Jones *v.* Reese, 65 Ala. 134; Taylor *v.* Harwell, 65 Ala. 1; Bell *v.* Watkins, 82 Ala. 512; Lindsay *v.* Harrison, 8 Ark. 302, 311 (*semble*); Easterly *v.* Kenny, 36 Conn. 18 (*semble*); Gray *v.* Corbit, 4 Del. Ch. 135, 167; Kempton *v.* Hallowell, 24 Ga. 52; Gray *v.* Obear, 54 Ga. 231; Bailie *v.* McWhorter, 56 Ga. 183; Samuel *v.* Salter, 3 Met. (Ky.) 259; Knefler *v.* Shreve, 78 Ky. 297 (*semble*); Parsons *v.* Spencer, 83 Ky. 305; Marshall *v.* Rash, 87 Ky. 116; Woolley *v.* Preston, 82 Ky. 415; Bland *v.* Bland (Ky., 1890), 14 S. W. R. 423; Bull *v.* Ky. Bank (Ky., 1890), 14 S. W. R. 425; Hallett *v.* Thompson, 5 Paige, 583; Bryan *v.* Knickerbacker, 1 Barb. Ch. 409; Havens *v.* Healy, 15 Barb. 296; Rome Bank *v.* Eames, 4 Abb. Ap. 83, 99; Bramhall *v.* Ferris, 14 N. Y.

BROADWAY NATIONAL BANK *v.* C. W. ADAMS, AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER 17, 18, 1881, MARCH 27, JUNE 29, 1882.

[*Reported in* 133 *Massachusetts Reports*, 170.]

MORTON, C. J. The object of this bill in equity is to reach and apply in payment of the plaintiff's debt due from the defendant Adams the income of a trust fund created for his benefit by the will of his brother. The eleventh article of the will is as follows: "I give the sum of seventy-five thousand dollars to my said executors and the survivors or survivor of them, in trust to invest the same in such manner as to them may seem prudent, and to pay the net income thereof, semi-annually, to my said brother Charles W. Adams, during his natural life, such payments to be made to him personally when convenient, otherwise, upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment. At the decease of my said brother Charles, my will is that the net income of said seventy-five thousand dollars shall be paid to his present wife, in case she survives him, for the benefit of herself and all the children of said Charles, in equal proportions, in the manner and upon the conditions the same as herein directed to be paid him during his life, so long as she shall remain single. And my will is, that, after the decease of said Charles and the decease or second marriage of his said wife, the said seventy-five thousand dollars, together with any accrued interest or income thereon which may remain unpaid, as herein above directed, shall be divided equally among all the children of my said brother Charles, by any and all his wives, and the representatives of any deceased child or children by right of representation."

There is no room for doubt as to the intention of the testator. It is clear that, if the trustee was to pay the income to the plaintiff under an order of the court, it would be in direct violation of the intention of the testator and of the provisions of his will. The court will not com-

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41, 44; Dick *v.* Pitchford, 1 Dev. & B. Eq. 480; Bank *v.* Forney, 2 Ired. Eq. 181, 184; Mebane *v.* Mebane, 4 Ired. Eq. 131; Pace *v.* Pace, 73 N. Ca. 119, Hobbs *v.* Smith, 15 Oh. St. 419; Wallace *v.* Smith, 2 Handy, 79, Tillinghast *v.* Bradford, 5 R. I. 205; Heath *v.* Bishop, 4 Rich Eq 46, Wylie *v.* White, 10 Rich. Eq. 294; Nickell *v* Handly, 10 Grat. 336 (*semble*); Bridge *v.* Ward, 35 Wis. 687, 690; Harris *v.* Judd, 3 Hawaiian, 421 *Accord.*

See also the admirable discussion of this question in Gray, Restraints on Alienation, §§ 134–277 *a.*

The cases *contra* will be found *infra*, p. 400, n. 2 In the note just referred to, as well as in this note, the citations include not only bankruptcy cases, but also those involving the rights of creditors proceeding by bills for equitable execution, and cases illustrating the *cestui que trust's* right of voluntary alienation, a common principle running through them all. — ED.

pel the trustee thus to do what the will forbids him to do, unless the provisions and intention of the testator are unlawful.

The question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in this Commonwealth. The tendency of our decisions, however, has been in favor of such a power in the founder.[1]

It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to the nature of the estate granted.[2]

Lord Coke gives as the reason of the rule, that "it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien," and that this is "against the height and puritie of a fee simple." By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of one of its legal incidents and attributes, namely, its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable.

The question whether the rule of the common law should be applied to equitable life estates created by will or deed, has been the subject of conflicting adjudications by different courts, as is fully shown in the able and exhaustive arguments of the counsel in this case. As is stated in Sparhawk *v.* Cloon,[3] from the time of Lord Eldon the rule has prevailed in the English Court of Chancery, to the extent of holding that when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cessor or limitation of the estate itself, can protect it from his debts.[4] Brandon *v.* Robinson.

The English rule has been adopted in several of the courts of this country.[5]

Other courts have rejected it, and have held that the founder of a trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts.[1]

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[1] Braman *v.* Stiles, 2 Pick. 460; Perkins *v.* Hays, 3 Gray, 405; Russell *v.* Grinnell, 105 Mass. 425; Hall *v.* Williams, 120 Mass. 344; Sparhawk *v.* Cloon, 125 Mass. 263.

[2] Co. Lit. 223 *a*; Blackstone Bank *v.* Davis, 21 Pick. 42.

[3] 125 Mass. 263.

[4] Green *v.* Spicer, 1 R. & My. 395; Rochford *v.* Hackman, 9 Hare, 475; Trappes *v.* Meredith, 9 Eq. 229; Snowdon *v.* Dales, 6 Sim. 524; Rippon *v.* Norton, 2 Beav. 63.

[5] Tillinghast *v.* Bradford, 5 R. I. 205; Heath *v.* Bishop, 4 Rich. Eq. 46; Dick *v.* Pitchford, 1 Dev. & Bat. Eq. 480; Mebane *v.* Mebane, 4 Ired. Eq. 131.

The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity. It seems to us that this principle extends to and covers the case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semiannually the income of the fund, which upon its payment to him, and not before, was to become his absolute property. His intentions ought to be carried out, unless they are against public policy. There is nothing in the nature or tenure of the estate given to the *cestui que trust* which should prevent this. The power of alienating in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements.

We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. The only ground upon which it can be held to be against public policy is, that it defrauds the creditors of the beneficiary.

It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate, especially in this Commonwealth, where all wills and most deeds are spread upon the public records. There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy. We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his trustees a discretion as to paying it. He has the entire *jus disponendi*, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given.

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[1] Holdship *v.* Patterson, 7 Watts, 547; Shankland's Appeal, 47 Penn. St. 113; Rife *v.* Geyer, 59 Penn. St. 393; White *v.* White, 30 Vt. 338; Pope *v.* Elliott, 8 B. Mon. 56; Nichols *v.* Eaton, 91 U. S. 716; Hyde *v.* Woods, 94 U. S. 523.

The rule of public policy which subjects a debtor's property to the payment of his debts, does not subject the property of a donor to the debts of his beneficiary, and does not give the creditor a right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach.

Whether a man can settle his own property in trust for his own benefit, so as to exempt the income from alienation by him or attachment in advance by his creditors, is a different question, which we are not called upon to consider in this case.[1] But we are of opinion that any other person, having the entire right to dispose of his property, may settle it in trust in favor of a beneficiary, and may provide that it shall not be alienated by him by anticipation, and shall not be subject to be seized by his creditors in advance of its payment to him.

It follows, that, under the provisions of the will which we are considering, the income of the trust fund created for the benefit of the defendant Adams cannot be reached by attachment, either at law or in equity, before it is paid to him. *Bill dismissed.*[2]

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[1] This question has been answered in the negative. Warner *v.* Rice, 66 Md. 436; Pacific Bank *v.* Windham, 133 Mass. 175; Jackson *v.* Van Zedlitz, 136 Mass. 342; McIlvaine *v.* Smith, 42 Mo. 45; Lackland *v.* Smith, 5 Mo. Ap. 153; Lampert *v.* Haydel, 96 Mo. 439 (*semble*); Mackason's App., 42 Pa. 330; Andress *v.* Lewis, 17 W. N. (Pa.) 270; Lewis *v.* Miller, 22 W. N. (Pa.) 94; Ghormley *v.* Smith, 139 Pa. 584. — ED.

[2] Nichols *v.* Eaton, 91 U. S. 711 (*semble*); Hyde *v.* Woods, 94 U. S. 523 (*semble*, but see Nichols *v.* Levy, 5 Wall. 433, 441); Steib *v.* Whitehead, 111 Ill. 247; Spindle *v.* Shreve, 111 U. S. 542, 4 Fed. Rep. 136 (based on an Illinois statute); Roberts *v.* Stevens, 84 Me. 325; Smith *v.* Towers, 69 Md. 77 (Alvey, C. J., and Bryan, J., dissenting); Braman *v.* Stiles, 2 Pick. 460 (*semble*); Billings *v.* Marsh, 153 Mass. 311; Leigh *v.* Harrison (Miss. 1892), 11 S. R. 604; Lampert *v.* Haydel, 96 Mo. 439; Partridge *v.* Cavender, 96 Mo. 452; (compare Bank of Commerce *v.* Chambers, 96 Mo. 459;) Fisher *v.* Taylor, 2 Rawle, 33; Vaux *v.* Parke, 7 Watts & S. 19; Norris *v.* Johnston, 5 Barr, 287; Eyrick *v.* Hetrick, 13 Pa. 488; Shankland's App., 47 Pa. 113; Rife *v.* Geyer, 59 Pa. 393; Keyser *v.* Mitchell, 67 Pa. 473; Overman's App., 88 Pa. 276; Thackara *v.* Mintzer, 100 Pa. 151; Guardians *v.* Mintzer, 16 Phila. 449; Eberly's App., 110 Pa. 95; Ghormley *v.* Smith, 139 Pa. 584; Jourolomon *v.* Massengill, 86 Tenn. 81 (overruling Turley *v.* Massengill, 7 Lea, 353; Hooberry *v.* Harding, 10 Lea, 392);

IN RE BULLOCK.
GOOD *v.* LICKORISH.

IN CHANCERY, BEFORE KEKEWICH, J., MARCH 17, 21, 1891.

[*Reported in* 60 *Law Journal Reports, Chancery,* 341.]

By the will and codicil of Edwin Bullock (who died on the 14th of February, 1870), all the real and personal estate of the testator were vested in the plaintiffs Charles Patten Good and Henry Williams, and the testator's widow Mary Bullock, his executors and trustees, in trust for the testator's children, and the issue born in his lifetime of Mary Bullock, as she should by deed or will appoint, and, failing such appointment, and so far as the same should not extend, in trust for those of his six children who should be living at her death, and the issue of such as should be then dead leaving issue.

Mary Bullock, by her will dated the 29th of May, 1883, directed and appointed as follows: —

"My late husband's trustees or trustee shall stand possessed of 15,000*l.*, further part of the said net proceeds, upon trust to invest the same in some or one of the modes of investment by law authorized for the investment of trust funds, and to pay the income of such investments to the said Theodore Walter William Bullock, during his life or until he shall become a bankrupt or a liquidating debtor, or cease to be entitled to receive such income, or any part thereof, for his own personal use or benefit, by any means or for any purpose. And in the event of, and upon the said T. W. W. Bullock becoming a bankrupt or a liquidating debtor, or ceasing to be entitled to receive the said income, or any part thereof, for his own personal use or benefit by any means or for any purpose, to pay to him or apply for his benefit, during the remainder of his life, either the whole, or so much, and so much only of the said income, as my late husband's trustees or trustee shall in their or his uncontrolled discretion think fit, and, subject to the aforesaid interest hereinbefore appointed in favor of the said T. W. W. Bullock, my late husband's trustees or trustee shall hold the said 15,000*l.*, and the investments and income (including any accumulations of income) thereof, in trust for the child, if only one, or all the children

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White *v.* White, 30 Vt. 338 (*semble*); Barnes *v.* Dow, 59 Vt. 530; Garland *v.* Garland, 87 Va. 758 *Accord.*

See *supra*, p. 397, n. 1, last paragraph. — ED.

In a few jurisdictions, e. g., California, Kansas, Michigan, Minnesota, New Jersey, New York, and Tennesee, the rights of creditors of the *cestui que trust* are regulated by statute, the creditors being either excluded altogether, or allowed to reach only the surplus income, that may remain after providing for a suitable support of the *cestui que trust*. See Gray, Restraints on Alienations, §§ 286–296, and also Cummings *v.* Corey, 58 Mich. 493; Hardenburgh *v.* Blair, 30 N. J. Eq. 645; Tolles *v.* Wood, 99 N. Y. 616; Kilroy *v.* Wood, 49 Hun, 636; Hoyt's Estate, 12 N. Y. Civ. Pr. 208. — ED.

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equally if more than one, born in my lifetime, of the said T. W. W. Bullock, and if there be no such child, in trust for the said William Bullock, Mary Holyoake Bullock, Constance Bullock, and Dorothy Marian Good as tenants in common in equal shares."

The testatrix died on the 29th of December, 1886, and her will, and several codicils which did not affect the above appointment, were proved by her executors, the plaintiffs Charles Patten Good and Henry Williams, on the 15th of February, 1887.

The above-named T. W. W. Bullock was a son of the testator and testatrix, and W. Bullock, M. H. Bullock, and C. Bullock, were the children of E. L. Bullock, a son of the testator and testatrix, who died in the lifetime of the latter, and E. M. Good was a child of L. M. Good, a daughter of the testator and testatrix.

The trustees invested the 15,000*l.* in the purchase of 12,011*l.* London and North-Western Railway 4 per cent perpetual debenture stock, the interest on which was payable on the 15th of January and 15th of July, and the interest was paid to T. W. W. Bullock up to and including the 16th of July, 1890.

On the 23rd of August, 1890, the trustees received notice of a memorandum of charge dated the 30th of January, 1889, from T. W. W. Bullock to Lickorish & Bellord, solicitors, on all his interest under the will of the testatrix to secure money of which about 500*l.* was stated to be owing.

On the 23rd of October, 1890, a receiving order was made against T. W. W. Bullock, and on the 14th of November, 1890, the trustees received a notice that the official receiver claimed the 12,011*l.* stock as trustee in the bankruptcy of T. W. W. Bullock; he subsequently claimed the proportion of interest due at the date of the receiving order; but the claims of the trustee were afterwards withdrawn. The trustees took out an originating summons, asking (*inter alia*) whether the plaintiffs properly might during the life of T. W. W. Bullock apply the whole, or any, and what part, of the income of the trust fund in providing in such manner as they might from time to time think fit for the past and future lodging, board, clothing, maintenance, and support of T. W. W. Bullock, and the payment of sundry legal expenses incurred by him or on his behalf in and since July, 1890, or how the said income ought to be dealt with by the plaintiffs.

This summons was adjourned into Court.

Rawlins, for the plaintiffs.

Maidlow, for the assignees of T. W. W. Bullock.

Warmington, Q.C., and *Marcy*, for William Bullock and Constance Emily Whitcombe (formerly Constance Emily Bullock) claiming under the gift over.

Ashton Cross, for the other persons entitled under the gift over, who were not hostile to the bankrupt.[1]

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[1] The arguments of counsel are omitted.

Kekewich, J. (on March 21). — At the conclusion of the arguments on this point, I held that the particular assignee represented by Mr. Maidlow was not entitled to any part of the income in which Theodore Walter William Bullock takes an interest under the will. He only claimed that which accrued before notice of his assignment was given to the trustees of the will, and that on the ground that until such notice was given the assignment was not perfect, and Mr. Bullock could not until then be said to have ceased to be entitled to receive the income for his own personal use or benefit. I held that, although for some and important purposes the assignment might fairly be said to be not perfect until notice given, yet, as between assignor and assignee, it was perfect as from its date, and operated a cesser of the assignor's title to receive the income. I advert to this now because, with reference to the point remaining to be decided, it is important to observe that the particular assignee has no interest. It is also important to observe that the general assignee — that is, the trustee in bankruptcy — makes no claim. He has abstained from doing so deliberately, and I have no doubt wisely. He could not, so far as I can see, have put forward any tenable argument in support of a claim if made. The question is therefore raised as between Mr. Bullock and those entitled under the gift over — or rather such of them as claim adversely to him, for they do not all act together or take the same view. Mr. Warmington's argument for them was that the language of the will only empowers the trustees to pay the income to Mr. Bullock or to apply it for his benefit, and that neither of these things can be done. As regards payment, reliance was placed on the decision in *In re* Coleman; Henry *v.* Strong, and my own judgment in *In re* Neil; Hemming *v.* Neil,[1] to which, on reflection, I adhere; and it was said that to pay income to Mr. Bullock would be to make a payment in derogation of the overriding title of the trustee in bankruptcy, and therefore a wrongful payment, which would be no discharge to the trustees of the will, and would render them accountable to the trustee in bankruptcy. That argument is, I think, well founded. As regards applications for the benefit of Mr. Bullock, the argument took this form: It was said that where the Court has upheld a discretionary trust for application, arising on bankruptcy, or the equivalent of bankruptcy, the discretion has been exercisable with reference to wife and children as well as the bankrupt, and the decisions of the Court have proceeded on the impossibility of determining beforehand what, if anything, the trustees would, in the exercise of their discretion, apply for the benefit of the bankrupt as distinguished from the other objects of their power. For this, reference was made to two cases as examples of a class, — Godden *v.* Crowhurst[2] and Kearsley *v.* Woodcock.[3] The language of the judgments, and especially that of Vice-Chancellor Shadwell in Godden *v.* Crowhurst,[4] countenances the argument, but the precise point which I have now to consider was not before the Court in either case, and I cannot think that either Judge intended to decide it. I can see no reason on principle for defeating the obvious intention of the testatrix. That obvious intention was to enable the trustees, in the event of Mr. Bullock's bankruptcy, to apply for his benefit the income, or an adequate part of the income, which he thereupon ceased to be entitled to receive. It is clear, and the trustee in bankruptcy has practically admitted, that he can take no interest in income thus applied; and it is difficult to see how those entitled under the gift over can successfully claim as coming to them what, if it does not come to them, would not go to the trustee in bankruptcy. The argument in opposition to their claim is strongly supported by Chambers *v.* Smith.[1] It is a Scotch case, but the Scotch law was expressly stated to be on this point in no way different from that of England. It was there held that trustees possessing a discretionary power, such as the trustees of this will possess, might exercise it in favor of the beneficiaries occupying Mr. Bullock's position, notwithstanding arrestment by judgment creditors. The law is expounded by the several learned Lords who gave their opinions to the House, but it will suffice to refer to those of Lord Chancellor Hatherley and Lord Blackburn. There is a passage in the Lord Chancellor's judgment[2] which seems to me directly applicable to the case in hand. It may be thus applied: Mr. Bullock has no control over the fund when the trustees resolve to exercise their discretionary power. He cannot, and no one claiming through him can, make a claim against the trustees for payment. It would be a sufficient answer to any such claim to say, "We have postponed such payment to you personally, and intend ourselves to apply the money for your behoof." And on page 807 he says, "If I am correct in holding as I do that the trust powers could not be destroyed by the objects of them becoming indebted, which, indeed, seems the time at which the testator would have desired them to be brought into action, then the trustees are not innovating, but only exercising their rights as conferred upon them by their truster at their own discretion." On page 817 Lord Blackburn notices the great and fundamental difference between a gift to one, either direct or through the medium of trustees, who are mere conduit-pipes to convey the gift to the beneficiary, and a gift subject to a power reserved to trustees, to be exercised paramount to the beneficiary and in his despite; and adds, "I think the arrestment fixes the date at which it is to be determined whether the arresters have a right to attach the fund, and anything that is subsequently done by the debtor, or by those who have rights against the debtor, or by those who claim under him, comes too late after that." In other words, the assignment in this case, which is equivalent to the arrestment in the case before the House of Lords, called the discretionary power of the trustees into operation; and it would be a contradiction to hold that the power is inoperative just when it was intended to be exercised. What the trustees, in the exercise of their discretion, do not from time to time think fit to apply for the benefit of Mr. Bullock goes, by the words of the will, to those entitled under the gift over; but they take only this overplus, and cannot claim what the trustees determine to apply. I was asked by the trustees to define the limits within which they may apply the income for Mr. Bullock's benefit. I find it extremely difficult to do this in the abstract, and I am unwilling to fetter the trustees' discretion, which was intended to be, and ought to be construed as, large. I could not refuse to determine any particular question submitted by them to the Court, and if any real difficulty occurs, they would probably be justified in asking the Court's protection. I can say no more at present than that they certainly may, in my opinion, spend the whole or any part of the income in maintenance, using that word in its most general and widest sense; and I doubt whether I was right in saying in the course of the argument that they could not properly pay Mr. Bullock's debts. The discretion is vested in them, and though, as already mentioned, they are entitled to the assistance of the Court if a case of real difficulty occurs, they must exercise it; and so long as they exercise it honestly — that is, as men of ordinary business habits and prudence, and with due regard to all the circumstances of the case — the Court will not interfere with them.[1]

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[1] 62 L. T. Rep. 649.

[2] 10 Sim. 642.

[3] 3 Hare, 185.

[4] 10 Sim. 642.

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[1] 3 App. Cas. 795.

[2] 3 App. Cas. at p. 804.

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[1] Where, as in the principal case, the trust is to *apply*, as distinguished from paying, such portion of the income of the trust fund as the trustee shall think fit, for the support of A, the creditors of A can derive no benefit from the trust. Twopeny *v.* Peyton, 10 Sim. 487; Chambers *v.* Smith, 3 App. Cas. 795; Gray *v.* Corbit, 4 Del. Ch. 135; Baker *v.* Brown, 146 Mass. 369; Slattery *v.* Wason, 151 Mass. 266. *A fortiori* the creditors can get nothing, where the trustee has an option to exclude A altogether. Lord *v.* Bunn, 2 Y. & C. C. C. 98; Holmes *v.* Penney, 3 K. & J. 90; Davidson *v.* Kemper, 79 Ky. 5; Staub *v.* Williams, 5 Lea, 458. See also *Re* Landon, 40 L. J. Ch. 370. 18 R. I. 517.

If the trustee is to apply the whole of the income for the support of A, the bequest is treated as a gift out and out, and the income, wherever Brandon *v.* Robinson is followed, may be reached by A's creditors. Green *v.* Spicer, 1 R. & My. 395; Snowdon *v.* Dales, 6 Sim. 524; Younghusband *v.* Gisborne, 1 Coll. 400. But see *contra*, Godden *v.* Crowhurst, 10 Sim. 642; Wetmore *v.* Truston, 51 N. Y. 338.

If the trust is for the support of A and others, for example, his wife, or his family, the rights of A's creditors vary in different jurisdictions. In some cases the creditors have been held entitled to the whole income, except a proper allowance for the wife or the family. Page *v.* Way, 3 Beav. 20; Kearsley *v.* Woodcock, 3 Hare, 185; Wallace *v.* Anderson, 16 Beav. 533. In others the creditors have received nothing because of the impracticability of dividing the income. Durant *v.* Mass. Co., 2 Low. 575; Hill *v.* McRae, 27 Ala. 175; Bell *v.* Watkins, 82 Ala. 512; Tolland Co. *v.* Underwood, 50 Conn. 493; Nickell *v.* Handley, 10 Grat. 336.

If the trust is to *pay* the income to A, although for his support, the creditors if not expressly excluded can reach all that A is entitled to even in jurisdictions where spendthrift trusts are allowed. Maynard *v.* Cleaves, 149 Mass. 307; Slattery *v.* Wason, 151 Mass. 266, 268. — ED.

55 Fed. 783, but see 59 Fed. 92

159 Mass 164, 169.

SECTION VII.

By Act of Creditors.

(*a*) CREDITORS OF TRUSTEE.

N. L. STITH *v.* JACOB LOOKABILL.

IN THE SUPREME COURT, NORTH CAROLINA, JUNE TERM, 1874.

[*Reported in* 71 *North Carolina Reports*, 25.]

CIVIL ACTION, to recover possession of certain real estate tried at the Spring Term, 1874, of the Superior Court of DAVIDSON County, before his Honor, Judge Cloud.

The plaintiff showed title from the State to one J. M. Lisle; then a deed from Lisle to one F. M. Camman; then an original attachment against Camman, which was duly levied on the premises, and after proper proceedings had thereon, a final judgment in said attachment, and a *ven. ex.* issued to sell the land. Plaintiff further showed a sale and that A. B. Stith became the purchaser, who dying *pendente lite*, willed the same to the plaintiff; also, that the defendant was in possession.

Here, the plaintiff resting his case, the defendant moved the Court to non-suit the plaintiff, on the ground that Camman did not acquire such an interest as was the subject of attachment, levy, and sale under execution, — the defendant stating that if his Honor should overrule the motion, he had evidence to offer showing title in himself.

His Honor sustained the motion and non-suited the plaintiff. From this judgment the plaintiff appealed.

The provisions of the deed to Camman are sufficiently set forth in the opinion of the Chief Justice.

Bailey, for the plaintiff.

Dillard & Gilmer, with whom was *J. M. McCorkle*, for defendant.[1]

PEARSON, C. J. Upon the motion to non-suit, the only question was, "had Camman such an estate as was subject to sale under execution by his creditors?" On this depended the right of the plaintiff, who was the purchaser, to maintain an action against the defendant, who for the purposes of the motion stands as a wrong-doer, without connection, either as assignee or agent, with the *cestui que trusts* for whom Camman is assumed to have held the legal estate.

Mr. Gilmer in a well-considered argument admitted the general positions taken by Mr. Bailey, in respect to "uses and trusts," to-wit:

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[1] The arguments of counsel are omitted. — ED.

1. This case did not come within the operation of Stat. 27th Henry VIII. So the legal title was in Camman, subject to the trust, set out in the deed "for the sole and exclusive benefit of the members of a company called and known as the 'Conrad Hill Gold and Copper Company,'" their successors and assigns forever.

2. Camman, in the Courts of law, was considered to be the owner of the land, and no notice was taken of the trust, to which he was subject.

3. Camman had power to assign the legal estate; and it could be sold under an execution against him, the purchaser taking subject to the trust, and notice being presumed.

4. Under the old system the plaintiff would have been entitled to judgment on a demurrer to the evidence.

Mr. Gilmer then "proved by the books" that although the plaintiff was in a Court of law (under the old system) treated as the absolute owner of the estate, still being a trustee, on the face of the deed by which he derives title, he and his assignee, whether by his own sake, or that of the sheriff, is subject to the control of the Courts of Equity, by which these *trusts estates* were upheld and treated, as the *real ownership.* See the reasoning in Blackmer *v.* Phillips, 67 N. C. 340.

The trustee or his assignee will be enjoined from enforcing his mere legal right in order to take possession of the land. From these premises he drew the conclusion that under our new system, the Court acting both as a Court of Equity and a Court of law, the assignee of the trustee by sale on execution will not be allowed to take judgment for the recovery of the possession of the land.

The argument is well constructed, but it fails in this: under the old system the Court of Equity only interfered by injunction to prevent the trustee or his assignee from taking possession as against the *cestui que trusts*, or their assignee or agent, but did not interfere in favor of a wrong-doer, who fails to connect himself in any way with the *cestui que trusts*. Such is the law under the new system. In our case, for the purposes of the motion to non-suit, the *cestui que trusts* are not before the Court, and the defendant stands as a wrong-doer, withholding the possession from the plaintiff, who is the owner of the legal estate.

If Camman had brought the action, the defendant, so far as, for the purposes of the motion, as the matter now stands, would not have, under the old system, entitled himself to an injunction; neither can he do so under the new system, by which the equity of the case as well as the law is administered in the same *forum*, for the plain reason that he stands as a wrong-doer, withholding the possession from one having the legal estate, and does not in any way connect himself with the supposed *cestui que trusts.*

There is error. Judgment reversed and *venire de novo.*[1]

PER CURIAM. *Venire de novo.*

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[1] The assets of a testator cannot be taken even at law in satisfaction of a judgment against the executor. Farr *v.* Newman, 4 T. R. 621; McLeod *v.* Drummond, 17 Ves.

WHITWORTH *v.* GAUGAIN.

IN CHANCERY, BEFORE SIR JAMES WIGRAM, V. C., MARCH, 25, 26, 27, 28, APRIL 3, 1844.

[*Reported in* 3 *Hare*, 416.]

VICE-CHANCELLOR.[1] The plaintiffs, in this case, are equitable mortgagees of one George Cooke, by a deposit of title-deeds of free-hold estates, accompanied with a memorandum in writing, explaining that the purpose of the deposit was to secure a then existing debt and future advances.

To explain the legal effect of this transaction as between the plaintiffs the mortgagees, and Cooke the mortgagor, I shall content myself with quoting the words of the Lord Chancellor of Ireland, in the case of Rolleston *v.* Morton:[2] "If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them; and a court of equity will execute the charge." No one, I apprehend, could seriously contend that the memorandum in writing above set forth had not the effect of charging the property as between the mortgagees and the mortgagor. It created as perfect an equitable charge as intention and act can possibly create.

The defendants, between whom and the plaintiffs the contest in the cause exists, are judgment creditors of George Cooke, whose judgments were entered upon after the mortgage to the plaintiffs, and who have since, by means of elegits, obtained actual possession of the lands comprised in the mortgage; and the question between them is, which of the two is in equity to be preferred to the other?[3] In considering that

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152, 168, per Lord Eldon; Kinderley *v.* Jarvis, 22 Beav. 1, 23; Gaskell *v.* Marshall, 1 M. & Rob. 132; Williams *v.* Fullerton, 20 Vt. 346. See Whale *v.* Booth, 4 Doug. 36.

There are decisions also that a creditor of a trustee cannot even at law reach the property of the *cestui que trust*. Smith *v.* McCann, 24 How. 398; Baker *v.* Copenbarger, 15 Ill. 103; Elliott *v.* Armstrong, 2 Blackf. 198 (*semble*); Houston *v.* Nowland, 7 Gill & J. 480; Bancroft *v.* Consen, 13 Ala. 50 (*semble*); Ashurst *v.* Given, 5 Watts & S. 323; Wilhelm *v.* Fulmer, 6 Barr, 296; Shryock *v.* Waggoner, 28 Pa. 430; Townslow *v.* Barber, 27 Vt. 417; Barber *v.* Chopin, 28 Vt. 413; Hackett *v.* Callender, 32 Vt. 97; Hart *v.* Farmers' Bank, 33 Vt. 252; Abell *v.* Howe, 43 Vt. 403. See also Warren *v.* Ireland, 29 Me. 62; Chickering *v.* Lovejoy, 13 Mass. 51; Haynes *v.* Jones, 5 Met. 292.

A trustee cannot claim a homestead right in trust property. Shepherd *v.* White, 11 Tex. 346. See also *Re* Whitehead, 2 N. B. R. 599.

The creditor of a feoffee to uses might satisfy his judgment out of the property held in use. Y. B. 14 Hen. VIII. f. 4, pl. 5; *supra*, p. 284. — ED.

[1] See *supra*, 70 n. 1. — ED.

[2] 1 Dr. & War. 195.

[3] The bill, which was filed on the 17th of March, 1841, charged that the hereditaments and premises comprised in the said title-deeds (together with a policy of insurance which the plaintiffs also held as a further security) were wholly inadequate to satisfy the sums due to them by virtue of such equitable lien. The bill prayed that an account might be taken of what was due to the plaintiffs in respect of their equitable lien upon the said deeds and writings, and that they might be declared to have an

question I shall here repeat what I have on more than one occasion already said respecting Lord Cottenham's judgment when this cause was before him upon motion, namely, that I am satisfied he did not intend, by what he said, finally to decide the point now before me. However strong the leaning of his mind may have been in favor of the judgment creditor, he not only did not intend to decide it, but intended that it should be reserved. And I, therefore, consider myself not only at liberty, but bound, to decide the cause according to my own understanding of the law.

Now, if the question be not decided by that judgment, I have certainly a very strong opinion upon it. The more I consider the case, the more satisfied I feel that I stated the general principle correctly in Langton *v.* Horton when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this court would not protect the interest of the *cestui que trust* against the judgment creditor of the trustee.[1] The judgment of Lord Cottenham in Newlands *v.* Paynter [2]

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equitable mortgage upon the hereditaments and premises, and to be entitled to priority over the said elegits and judgments of Mayor and Pelle; that the hereditaments and premises included in the plaintiffs' said equitable mortgage (and the said policy) might be sold; and out of the proceeds of such sales the said debt and costs of the plaintiffs might be paid; and, if the same should be insufficient, that the plaintiffs might be admitted to prove for the deficiency against the estate of Cooke, in the bankruptcy. The bill also prayed the appointment of a receiver, and for an injunction. — ED.

[1] Medley *v.* Martin, Finch, 63; Newlands *v.* Paynter, 4 M. & C. 408; *Re* Morgan, 18 Ch. D. 93; Roberts *v.* Death, 8 Q. B. Div. 319; Gill *v.* Continental Co., L. R. 7 Ex. 332; Cooper *v.* Griffin, '92, 1 Q. B. 740 (explaining Cragg *v.* Taylor, L. R. 1 Ex. 148); McAuley *v.* Clarendon, 8 Ir. Ch. 121; Gordon *v.* Cheyne (Court of Session, 1824), L. S. 566; Wanzer *v.* Truly, 17 How. 584; Freedman's Co. *v.* Earle, 110 U. S. 710, 713; Hitchcock *v.* Galveston Co., 50 F. R. 263; Snediker *v.* Boyleston, 83 Ala. 408; Spicer *v.* Spicer, 21 Ga. 200; McLaurie *v.* Partlow, 53 Ill. 340; Tracy *v.* Kelly, 52 Ind. 535; Hollingsworth *v.* Trueblood, 59 Ind. 542; Heberd *v.* Wines, 105 Ind. 237; Taylor *v.* Duesterburg, 109 Ind. 165; Bennet *v.* Strait, 63 Iowa, 620; Morrill *v.* Raymond, 28 Kas. 415; Bostick *v.* Keizer, 4 J. J. Marsh, 597; Logan *v.* Moore, 7 Dana, 74, 77; Booker *v.* Carlile, 14 Bush, 154; Rogers *v.* Hendsley, 2 La. 597; Huntt *v.* Townshend, 31 Md. 336; Hartsock *v.* Russell, 52 Md. 619; Carter *v.* Porter, 55 Me. 337; Houghton *v.* Davenport, 74 Me. 591; Lerow *v.* Wilmarth, 9 All. 382; Hancock *v.* Titus, 39 Miss. 224; Callaway *v.* Johnson, 51 Mo. 33; South Church *v.* Hintze, 72 Mo. 363; Connor *v.* Follansbee, 59 N. H. 124; Ferrin *v.* Errol, 59 N. H. 234; Campfield *v.* Johnson, 1 Halst. Ch. 245; Bunn *v.* Mitchell, 27 N. J. Eq. 54; Ells *v.* Tousley, 1 Paige, 280; Lounsbury *v.* Purdy, 11 Barb. 490; Smith *v.* Bank, 4 Jones, Eq. 303; McGovern *v.* Knox, 21 Oh. St. 547; Drysdale's Appeal, 15 Pa. 457 (*semble*); Sheetz *v.* Negley, 13 Phila. 506; White *v.* Kavanagh, 8 Rich. 377; Thomas *v.* Walker, 6 Hum. 93; Click *v.* Click, 1 Heisk. 607; Gass *v.* Gass, 1 Heisk. 613; Sandford *v.* Weeden, 2 Heisk. 71; Baker *v.* Hardin, 10 Heisk. 300; Oberthier *v.* Stroud, 33 Tex. 522; Parker *v.* Coop, 60 Tex. 111; Williams *v.* Fullerton, 20 Vt. 346; Hackett *v.* Callender, 32 Vt. 97; Whit-

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[2] 4 Myl. & Cr. 408.

is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. Lodge *v.* Lyseley[1] is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment creditor of the vendor.[2] Again, take the case of an equitable charge to pay debts, or legacies, or any other equitable interest, except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrancer to be preferred to the judgment creditor of the debtor, in whom the legal estate in the property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of Williams *v.* Craddock,[3] the counsel, as well as the court, were of opinion, that an interest by way of equitable mortgage was entitled in this court to the same protection against judgments as other equitable claimants.

In the argument of this case both parties referred to, and drew conclusions from, the proposition that in a court of equity a purchaser for value, who obtains a conveyance of the legal interest without notice of an equity affecting the specific subject of his purchase, will in equity, as at law, have a better title to that subject than the mere equitable claimant. The proposition thus admitted, and necessarily admitted by both parties, is pregnant with consequences which go a great way towards deciding the question now before me. If the tenant by elegit is (as was argued) to be considered as a purchaser for value without notice under a conveyance, all trusts, and all equitable interest of every description, must be subject to the judgments against the trustee. For a purchaser for value, without notice from a fraudulent trustee, having got the legal estate, will unquestionably be preferred in equity to the *cestui que trust;* and it appears to me to be impossible, except by a merely arbitrary decision, to distinguish the case of an ordinary trust or other equitable interest from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is, for the present purpose, distinguishable from that of an ordinary *cestui que trust.* Again, it follows, conversely, that if the equitable interest of an ordinary *cestui que trust*, or any other

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comb *v.* Cardell, 45 Vt. 24; Borst *v.* Nalle, 28 Grat. 423; Summers *v.* Darne, 31 Grat. 791; Cowardin *v.* Anderson, 78 Va. 88; Sinclair *v.* Sinclair, 79 Va. 40 *Accord.*

But see Buck *v.* Webb, 7 Colo. 212; Roberts *v.* Brown, 1 Del. Ch. 388; Kennedy *v.* Lee, 72 Ga. 38; Hoffman *v.* Gosneld (M'd, 1892), 24 Atl. R. 28; Blakeley *v.* LeDuc, 25 Minn. 448; City Bank *v.* Hamilton, 34 N. J. Eq. 158, where the *cestui que trust* was postponed to creditors of the trustee. — ED.

[1] 2 Sim. 70.

[2] Finch *v.* Earl of Winchelsea, 1 P. Wms. 277 (*semble*); Prior *v.* Penpraze, 4 Price, 99; Lodge *v.* Lyseley, 4 Sim. 70; Thompson *v.* Edelin, 2 Har. & J. 64; Houston *v.* Nowland, 7 Gill & J. 480; Lane *v.* Ludlow, 6 Paige, 316 n.; Moyer *v.* Hinman, 13 N. Y. 180, 190; Smith *v.* Gage, 41 Barb, 60; Blackmer *v.* Phillips, 67 N. Ca. 340; Manley *v.* Hunt, 1 Ohio, 121; Barr *v.* Hatch, 3 Oh. 527 *Accord.* — ED.

[3] 4 Sim. 316.

equitable interest, is not subject to judgments against the trustee, though executed, then those judgments, though executed, are not analogous to purchases for value. In other words, the judgment creditor of a trustee is not a purchaser for value in the contemplation of a court of equity. The proposition, that a judgment creditor is a purchaser for value, would prove too much for the defendants' purpose. It would affect all equitable interests alike.

But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary *cestui que trust*, and other equitable interests (charges, for example, to pay debts and legacies paramount the title of the debtor), which it was admitted would be preferred in equity, — that the interest of the equitable mortgagee was imperfect; that of the *cestui que trust* perfect. In what respect is the interest of the equitable mortgagee imperfect? As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgagee, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee, or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think it is not) in the one case than in the other.

The most plausible way of stating the case in favor of the judgment creditor is by supposing his right to be founded in contract, and not to be the result of a proceeding in *invitum;* and this, no doubt, may be the truth of the case, when the judgment is voluntarily confessed; and I paid the greatest attention to the arguments of counsel upon that point. But, admitting that view to be correct, how does it alter the case? The question remains, — what was the contract? It was a general contract for a judgment, and the fruits of a judgment; and the original question, therefore, — what right does a judgment confer? — remains wholly untouched by the concession. If a party contracts specifically for a given property, pays the purchase-money, and obtains the legal title, without notice up to the time of obtaining the conveyance, as well as of paying his money, that may give him a right to be preferred to an equitable claim which is prior in point of time. But there is no principle upon which a court of justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the debtor. If the trustee were to confess a judgment, am I to imply that it amounts to a specific contract to give the creditor an interest in that which belongs to the *cestui que trust?* That appears to me to be the true distinction. In one case the party contracts for a specific thing, — in the other he merely takes a judgment, that gives him nothing more than a right to that which belongs to his debtor.

The above propositions, which, separately taken, I believe to be unimpeachable, will be found to meet every argument that was addressed to me in support of the defendants' case, independently of the late statutes.

I am clear that the late statutes make no difference in the case. So far as the judgment creditor claims to be a mortgagee, in writing, under the statute, he is posterior, in point of time, to the plaintiffs. But it was said that the equity of the judgment-creditor was equal to that of the equitable mortgagee, and that he has, by the force of the elegit executed, an estate at law in addition to his equitable interest, and therefore is to be preferred. I need not, after what I have already said, proceed to expose the fallacy of this argument; it takes for granted the whole question in dispute. That the tenant by elegit has an estate in that which he may lawfully take (that which belongs to his debtor), I do not deny; but to say that by force of the elegit he acquires a rightful interest in this court, in that which in equity does not belong to his debtor, is taking the whole matter in contest for granted, the whole question being what he may take.

I can only repeat that it appears to me impossible, except upon the most arbitrary distinction, to say that the interests of an equitable mortgagee are not to be protected, and yet that protection is to be afforded to the interests of an ordinary *cestui que trust* and other equitable interests. I do not go into the reasoning of the cases which have been cited; all of them, however, appear to me to support the view I have taken. If my judgment cannot be supported upon propositions which are indisputable in themselves, — whether properly applicable to the case or not, — no explanation I can give of the cases will at all strengthen the foundation of that judgment. I must hold that the plaintiffs have a right to the payment of their debt out of the estate comprised in the deed. If there is any difficulty in the details of the decree, the case may be mentioned again.[1]

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[1] Affirmed by Lord Cottenham, 1 Phill. 728, who said, p. 733: "In the argument on the part of the defendant, the case was put upon the footing of a purchaser for value without notice, who would be preferred to a prior equitable mortgagee. But a distinction in this respect has always been made between a judgment obtained without notice of a previous charge, and a purchase or mortgage. In the case already mentioned of Burgh v. Francis, judgments had been obtained, but they were not allowed to prevail against the plaintiff's equity. 'A purchaser without notice of the trust,' Lord Nottingham observed, 'may be free, but an incumbrance' (speaking of the judgments) 'is not like a sale.' The learned author of the *Forum Romanum* expresses himself to the same effect. 'In the case of a judgment creditor,' he says, 'the original security was only personal, and a court of equity will not suffer the person that originally lent upon the security of land to have the security destroyed by one who did not lend upon that security.' This distinction is also taken in the case of Brace v. The Duchess of Marlborough, 2 P. Wms. 491; in Taylor v. Wheeler, 2 Vern. 564; in Sir Simeon Stuart's Case, cited 3 Ves. 576; and in many other cases." See to the same effect Burgh v. Francis, 3 Swanst. 536, n. (*a*); Finch, 28 s. c.; Casberd v. Atty.-Gen., 6 Price, 411; Brearcliff v. Dorrington, 4 De G. & Sm. 122; Beavan v. Oxford, 6 D., M. & G. 507; Kindersley v. Jervis, 22 Beav. 1; Scott v. Hastings, 4 K. & J. 633; Eyre v. McDowell, 9 H. L. 619; Pickering v. Ilfracombe R. R., L. R. 3 C. P. 235; Abbott v.

Stratten, 3 Jones & Lat. 603; Dunster *v.* Glengall, 3 Ir. Ch. 47; Pennock *v.* Coe, 23 How. 117; *Re* Howe, 1 Paige, 125; Robinson *v.* Williams, 22 N. Y. 380; Ins. Co. *v.* Phœnix Co., 71 Pa. 31; Delaire *v.* Keenan, 3 Dess. 74.

On the same principle the mortgagee of property to be hereafter acquired will take precedence of a subsequent execution creditor of the mortgagor. Langton *v.* Horton, 1 Hare, 560; Holroyd *v.* Marshall, 10 H. L. C. 191 (reversing s. c. 2 D., F. & J. 596, and explaining Mogg *v.* Baker, 3 M. & W. 195); Brown *v.* Bateman, L. R. 2 C. P. 272; *Re* Clarke, 35 Ch. D. 109; Tailby *v.* Off. Receiver, 13 App. Cas. 523 (overruling Belding *v.* Read, 3 H. & C. 191, and *Re* D'Epineuil, 20 Ch. D. 758); *Re* Dublin Co., L. R. 13 Ir. 174; Mitchell *v.* Winslow, 2 Story, 630, 644; Pennock *v.* Coe, 23 How. 117 (see also Butt *v.* Ellett, 19 Wall. 544; 1 Woods, 214, s. c.); Beall *v.* White, 94 U. S. 382 (*semble*); Brett *v.* Carter, 2 Low. 458; Barnard *v.* Norwich Co., 14 N. B. R. 469 (see Schuelenburg *v.* Martin, 2 Fed. Rep. 747); Robinson *v.* Mauldin, 11 Ala. 977; Floyd *v.* Morrow, 26 Ala. 344; Apperson *v.* Moore, 30 Ark. 56 (*semble*); Gregg *v.* Sanford, 24 Ill. 17 (*semble*); Scharfenburg *v.* Bishop, 35 Iowa, 60 (*semble*); Hamlin *v.* Jerrard, 72 Me. 62; Griffith *v.* Douglas, 73 Me. 532 (see Morrill *v.* Noyes, 56 Me. 458; Deering *v.* Cobb, 74 Me. 332); People *v.* Bristol, 35 Mich. 28; Sillers *v.* Lester, 48 Miss. 513 (*semble*); Wright *v.* Bircher, 72 Mo. 179; Rutherford *v.* Steuart, 79 Mo. 216; France *v.* Thomas, 86 Mo. 80; Keating *v.* Hannenkamp, 100 Mo. 162; Smithurst *v.* Edmunds, 1 McCarter, 408; Williams *v.* N. J. Co., 29 N. J. Eq. 311, 320 (*semble*); Hale *v.* Omaha Bank, 49 N. Y. 626; McCaffrey *v.* Woodin, 65 N. Y. 459; Wisner *v.* O'Cumpaugh, 71 N. Y. 113; Coates *v.* Donnell, 94 N. Y. 168; Kribbs *v.* Alford, 120 N. Y. 519 (but see Farmers' Co. *v.* Long Beach Co., 27 Hun, 89); Phila. Co. *v.* Woelpper, 64 Pa. 366; Groton Co. *v.* Gardiner, 11 R. I. 626, Cork *v.* Corthell, 11 R. I. 482; Williams *v.* Briggs, 11 R. I. 476; Williams *v.* Winsor, 12 R. I. 9; Tedford *v.* Wilson, 3 Head, 311; Phelps *v.* Murray, 2 Tenn. Ch. 746; First Bank *v.* Turnbull, 32 Grat. 695.

But see *contra*, Ross *v.* Wilson, 7 Bush, 29; Moody *v.* Wright, 13 Met. 17, 30; Chase *v.* Denny, 130 Mass. 566; Cook *v.* Blanchard, 144 Mass. 207, 223; Chynoweth *v.* Tenney, 10 Wis. 397; Hunter *v.* Bosworth, 43 Wis. 583 (*semble*)

In England, and in most of the States in this country, a creditor can reach by legal process only the debtor's interest in a chose in action. Accordingly if the debtor has 2
previously assigned the chose in action, the creditor is bound by the assignment, even though the assignee has given no notice thereof to the obligor. Lewis *v.* Wallis, T. Jones, 222; Fashion *v.* Atwood, 2 Ch. Ca. 36; Hirsch *v.* Coates, 18 C. B. 757; Westoby *v.* Day, 2 E. & B. 605; Pickering *v.* Ilfracombe R. R., L. R. 3 C. P. 235 (overruling Watts *v.* Porter, 3 E. & B. 743); *Re* General Co., 32 Ch. D. 512; *Re* Bell, 54 L. T. Rep. 370; Badeley *v.* Consol. Bank, 34 Ch. D. 536, 38 Ch. Div. 238; Davis *v.* Freethy, 24 Q. B. Div. 519; Crayton *v.* Clark, 11 Ala. 787; Walling *v.* Miller, 15 Cal. 38; Sammis *v.* L'Engle, 19 Fla. 800; Whitten *v.* Little, Ga. Dec. (Pt. II.) 99; Walton *v.* Bethune, 37 Ga. 319; Daniels *v.* Meinhard, 53 Ga. 359; Cairo Co. *v.* Killenberg, 82 Ill. 295; Maghee *v.* Robinson, 98 Ill. 458 (but see First Church *v.* Hyde, 40 Ill. 150); Walters *v.* Washington Co., 1 Iowa, 404; Smith *v.* Clarke, 9 Iowa, 241; McWilliams *v.* Webb, 32 Iowa, 577; McGuire *v.* Pitts, 42 Iowa, 535; Van Winkle *v.* Iowa Co., 56 Iowa, 245; Ives *v.* Addison, 39 Kas. 172; Stockton *v.* Hall, Hardin, 160; Newby *v.* Hill, 2 Met. (Ky.) 530; Littlefield *v.* Smith, 17 Me. 327; Milliken *v.* Loring, 37 Me. 408; Hardy *v.* Colby, 42 Me. 381; Brady *v.* State, 26 Md. 290; Wakefield *v.* Martin, 3 Mass. 558; Dix *v.* Cobb, 4 Mass. 508; Providence Bank *v.* Benson, 24 Pick. 204; Martin *v.* Potter, 11 Gray, 37; Kingman *v.* Perkins, 105 Mass. 111; Norton *v.* Piscataqua Co., 111 Mass. 532; Thayer *v.* Daniels, 113 Mass. 129; Boston Music Association *v.* Cory, 129 Mass. 435; Taft *v.* Bowker, 132 Mass. 277; McDonald *v.* Kneeland, 5 Minn. 352; Williams *v.* Pomeroy, 27 Minn. 85; Smith *v.* Sterritt, 24 Mo. 260; Davis *v.* Carson, 69 Mo. 603; Greentree *v.* Rosenstock, 61 N. Y. 583; Williams *v.* Ingersoll, 89 N. Y. 508; Smith *v.* Longmire, 24 Hun, 257; Grosvenor *v.* Allen, 9 Paige, 74 (see also Van Buskirk *v.* Hartford Co., 14 Conn. 583); Haldeman *v.* Hillsborough Co., 2 Handy, 101; Copeland *v.* Manton, 22 Ohio St. 398; Oregon Co. *v.* Gates, 10 Oreg. 514; Stevens *v.* Stevens, 1 Ashm. 190; U. S. *v.* Vaughan, 3 Binn. 394; Pellman *v.* Hart, 1 Barr, 263; Patten *v.*

Wilson, 34 Pa. 399; Ins. Co. *v.* Phoenix, 71 Pa. 31; Noble *v.* Thompson Oil Co., 79 Pa. 354; Wallace's App., 104 Pa. 559; Tide Water Co. *v.* Kitchenman, 108 Pa. 630; Canal Co. *v.* Insurance Co., 2 Phila. 354; Noble *v.* Smith, 6 R. I. 446; Northam *v.* Cartwright, 10 R. I. 19; Lee *v.* Robinson, 15 R. I. 369; Alexander *v.* Adams, 1 Strob. 47, Tazewell *v.* Barrett, 4 Hen. & M. 259; Anderson *v.* De Soer, 6 Grat. 363; Bank of Valley *v.* Gettinger, 3 W. Va. 309; Gregg *v.* Sloan, 20 W. Va. 509.

But see *contra*, Woodbridge *v.* Perkins, 3 Day, 364; Judah *v.* Judd, 5 Day, 534; Bishop *v.* Holcomb, 10 Conn. 444 (*semble*); Van Buskirk *v.* Hartford Co., 14 Conn. 141; Clark *v.* Connecticut Co., 35 Conn. 303 (*semble*) (see also Warren *v.* Copelin, 4 Met. 594); Clodfelter *v.* Cox, 1 Sneed, 330; Mutual Co. *v.* Hamilton, 5 Sneed, 269 (*semble*); Dews *v.* Olwill, 59 Tenn. 432; Flickey *v.* Loney, 4 Baxter, 169 (*semble*); Penniman *v.* Smith, 5 Lea, 130; Daniels *v.* Pratt, 6 Lea, 443 (*semble*); Dinsmore *v.* Boyd, 6 Lea, 689 (*semble*); Robertson *v.* Baker, 10 Lea, 300 (see, however, Sugg *v.* Powell, 1 Head, 221; Gayoso Inst. *v.* Fellows, 6 Cold. 471–472; Cornick *v.* Richards, 3 Lea, 1); Barney *v.* Douglas, 19 Vt. 98; Ward *v.* Morrison, 25 Vt. 593; Loomis *v.* Loomis, 26 Vt. 198, 203 (*semble*); Dale *v.* Kimpton, 46 Vt. 76; Weed *v.* Boutelle, 56 Vt. 570. Conf. Conway *v.* Cutting, 51 N. H. 407.

In strict analogy with the preceding cases, one to whom certificates of stock have been transferred is protected against subsequent attaching creditors of the assignor, although no notice of the transfer has been given to the company. Robinson *v.* Nesbitt, L. R. 3 C. P. 264; Dunster *v.* Glengall, 3 Ir. Ch. 47; Continental Bank *v.* Eliot Bank, 7 Fed. Rep. 369; Scott *v.* Pequonnock Bank, 15 Fed. Rep. 494; Hazard *v.* Nat. Bank, 26 Fed. Rep. 94; People *v.* Elmore, 35 Cal. 653; Smith *v.* Crescent Co., 30 La. Ann. 1378; Friedlander *v.* Slaughter House Co., 31 La. Ann. 523; Boston Music Association *v.* Cory, 129 Mass. 435; Sibley *v.* Quinsigamond Bank, 133 Mass. 515 (but see Fisher *v.* Essex Bank, 5 Gray, 373; Boyd *v.* Rockport Mills, 7 Gray, 406; Blanchard *v.* Dedham Co., 12 Gray, 213; Rock *v.* Nichols, 3 All. 342, *contra*. In Massachusetts by Pub. St. c. 105, § 24, title to shares was made subject to a registry law as in the case of land. But this statute was repealed by St. 1884, c. 229, which protects an assignee who holds the certificate under a written transfer); Clark *v.* German Bank, 61 Miss. 613; Merchants' Bank *v.* Richards, 74 Mo. 77; Rogers *v.* Stevens, 4 Halst. Ch. 167; Broadway Bank *v.* McElrath, 2 Beas. 24; Hunterdon Bank *v.* Nassau Bank, 17 N. J. Eq. 496; Smith *v.* American Co., 7 Lans. 317; Dunn *v.* Starr Co., 19 N. Y. W. D. 531; Norton *v.* Norton, 43 Oh. St. 509; Comm. *v.* Watmough, 6 Whart. 117; Finney's Appeal, 59 Pa. 398; Early's Ap. 7 W. N. (Pa.) 184; Frazer *v.* Charleston, 11 S. Ca. 486; Cornick *v.* Richards, 3 Lea, 1 (overruling in effect State Co. *v.* Sax, 2 Tenn. Ch. 507); Cherry *v.* Frost, 7 Lea, 1 (*semble*); Strange *v.* Houston Co., 53 Tex. 162 (*semble*); Seeligson *v.* Brown, 61 Tex. 114 *Accord*.

But see Jones *v.* Latham, 70 Ala. 164 (statutory); Avels *v.* Mobile Co. (Ala. 1891), 9 S. R. 423 (statutory); Weston *v.* Bear River Co., 5 Cal. 186, 6 Cal. 425; Naglee *v.* Pacific Co., 20 Cal. 529; Shipman *v.* Ætna Co., 29 Conn. 245; Colt *v.* Ives, 31 Conn. 25; People's Bank *v.* Gridley, 91 Ill. 457; Fort Madison Co. *v.* Batavia Bank (Iowa, 1877), 32 N. W. R. 336 (statutory); Skowhegan Bank *v.* Cutler 49 Me. 315; Pinkerton *v.* Manchester Co., 42 N. H. 424; Scripture *v.* Soapstone Co., 50 N. H. 571; Sabin *v.* Bank of Woodstock, 21 Vt. 353; Cheever *v.* Mayer, 52 Vt. 66; Murphy's Applic. 51 Wis. 519 (statutory), *contra*. — Ed.

WORRALL *v.* HARFORD.

IN CHANCERY, BEFORE LORD ELDON, C., NOVEMBER 1, 1802.

[*Reported in* 8 *Vesey*, 4.]

THE bill stated that in and previous to the year 1769 Edward Lloyd and William James, of Bristol, carried on business as merchants and copartners; and the plaintiff was employed by them as their attorney and solicitor in all their legal business, and in procuring for them money on their bond; that Lloyd dying, and James sinking in credit, the plaintiff was employed to issue a commission of bankruptcy against him: and in or about February, 1771, struck a docket on the petition of Nathaniel Stephens; and was directed to summon, and did summon, a meeting of the creditors; when it was agreed that James should execute a deed of assignment for the benefit of all said creditors, to be prepared by the plaintiff; and accordingly by indenture, prepared by the plaintiff, and bearing date the 15th of January, 1772, it was witnessed, that William James did assign, transfer, and make over to defendants all the joint or copartnership stock in trade, upon trust to sell and dispose thereof; and thereout in the first place to pay the expenses attending the application for said commission of bankruptcy, and also all the costs and charges of said deed and other incidental charges and expenses of the trust; and to pay and reimburse themselves all such costs, charges, damages, and expenses which they should be put unto in the management and execution of said trust; and said defendants covenanted that they should make sale of said partnership effects, and get in all debts due to said copartnership; and further, that they should, as often as such moneys should, after deducting the payments to be made thereout as aforesaid, and reserving a sufficient sum to answer the further probable contingent expenses of the trust, amount to a competent sum to pay one shilling in the pound, pay the same equally amongst the said creditors according to their respective demands.

The bill further stated, that the affairs of said partnership being very intricate, and there being various legal proceedings, and particularly an appeal from one of his Majesty's courts in America, plaintiff was directed by said defendants to conduct such appeal on their behalf, and generally to manage and direct the legal business relating to said partnership, and the trusts of the deed; and the plaintiff from time to time prepared deeds relating to said trust affairs, and prosecuted the appeal, and disbursed various sums, and took various journeys, and had and made various attendances on account of the trustees; and by his exertions and labor, and the sums expended by him, the defendants became indebted to the plaintiff in a considerable sum. Upon the execution of the trust deed the trustees proceeded to act in the trust; but the whole of such partnership debts and credits have never been finally settled, nor have all the trusts of said deed been performed and the accounts closed. The plaintiff hath delivered in bill of costs and disbursements paid and incurred by him as solicitor under the trust deed, and received some sums upon account from the said trustees; but he hath never settled any account with said trustees, and the whole of such bills have never been paid. James is long since deceased; and the defendants, the surviving trustees, have never made any final dividend; and the plaintiff, as solicitor of said trustees, having a considerable demand upon them, as before mentioned, frequently applied, and requested them to come to an account of said trust estate possessed or received by them under the deed, and to apply out of the balance in their hands a sufficient sum to discharge the bills and demands of plaintiff, and particularly on or about the 9th January, 1784, 19th November, 1787, 24th April, 1790, 15th November, 1790; and at several times since, said William James made applications to them for the same purpose. The bill then charged that a considerable balance, amounting to £80 9*s.* 3*d.* remains due to him as such solicitor; and though many years have elapsed since the execution of the deed, yet that plaintiff hath continued from the date thereof nearly to the present time to act as solicitor thereto, and hath delivered bills of costs to the said defendants, and made applications for payment; that his debt ought not to be considered as a simple-contract debt, as it is by the deed in the first place provided that the trustees shall out of the moneys to come to their hands pay and discharge the expenses of the commission of bankruptcy, and also all costs and charges of that deed, and also all other incidental charges and expenses relating to the execution of the trust thereof; and in the next place, that the trustees should pay and reimburse themselves all their costs and charges relative thereto; and therefore his demand ought to be considered as a specialty debt, and the plaintiff had a lien upon the trust estate for his costs and charges.

The prayer of the bill was, that the plaintiff may be declared a creditor under the trust deed for the amount of his bills of fees; that the defendants may account for all and every the sums received by them, and for the application; and that they may be decreed thereout to pay to the plaintiff the sum of £80 9*s.* 3*d.*, &c.

To this bill the defendants, the surviving trustees, put in a general demurrer.

Mr. Richards and *Mr. Hart*, in support of the demurrer.

Mr. Romilly and *Mr. Martin*, for the plaintiff.[1]

The LORD CHANCELLOR [ELDON]. This case must be determined upon the contents of this particular deed, with some attention to the nature of trust deeds in general, and the allegations of the bill. It is admitted that a bill of this kind is a perfect novelty. It is in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust. That is implied in every such deed. But it would be strange from that implication to conclude that the persons employed by them are therefore creditors of the trust fund. [I doubt very much, and desire not to be understood to admit, that, even if the trustees are charged not to be solvent, those persons may come upon the fund.] They can have no better right upon the expression of what would, if not expressed, be implied. But particular cases may be exceptions. Try this in bankruptcy. The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there was nothing special in the deed, would have a clear right to pay all the expense incurred? It would be implied, if not expressed. But can it be said that therefore not the solicitor only, but every person with whom the trustees had incurred a just and fair demand, might sue the trustees, and come for an account of the whole administration? That would be quite mischievous.

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[1] The arguments of counsel and a portion of the opinion relating to a question of pleading are omitted. — ED.

This plaintiff had been employed to take out a commission of bankruptcy against the surviving partner. To the whole extent he had proceeded, Stephens was and remained his debtor personally at the time this project was thought of. He remained so after the meeting for the purpose of this trust deed. If the trustees had shown that they had paid Stephens in respect of that commission of bankruptcy, it would be impossible for this plaintiff to have a demand against them. The proposal to supersede the commission, and that a trust deed should be executed, providing for the expenses of preparing the deed, and that all the costs and charges should be reimbursed, succeeded. Suppose a bill had been filed recently after the transaction, and the proceedings and trust deed not paid for: the plaintiff, no party to the deed, and having clearly had the personal liability of Stephens and the trustees as to the commission, and the personal liability of the trustees for preparing the deed, if they accepted it. It was not the meaning of the deed that he should have a right to sue in this way. It was his duty to inform them of the inconvenience of giving a right to sue in this way; for, as it has been observed, this would not stop with the solicitor, for many other persons might be employed in the execution of the trust.

The demurrer was allowed.[1]

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[1] Hall *v.* Laver, 1 Hare, 571 *Accord.*

In Hall *v.* Laver, *supra*, Sir J. Wigram, V. C., said, p. 577: "The case therefore resolves itself into a question of law, namely, whether if a trustee, or one of several *cestui que trusts*, employs a solicitor to act in the matters of the trust, that retainer gives the solicitor a right of action against each of the other *cestui que trusts*, or a lien upon their shares of the trust estate, for his costs incurred in relation to the trust. That the above circumstances give no right of action against any but the retaining party is clear. That the same circumstances give no lien upon a trust fund, not administered in court, is more than proved by the case of Worrall *v.* Harford, 8 Ves. 4, in which it was clearly laid down, by Lord Eldon, that a solicitor employed by a trustee has no lien upon the trust fund for his costs, although the trustee paying those costs might himself retain them out of the fund."

But see *Re* Pumfrey, 22 Ch. D. 255. — Ed.

STRICKLAND *v.* SYMONS.

IN THE COURT OF APPEAL, FEBRUARY 8, 9, 1884.

[*Reported in* 26 *Chancery Division*, 245.]

THIS was an appeal from a judgment of Baron Pollock.[1]

The facts, which are stated at length in the previous report, were shortly as follows: —

By the marriage settlement of Dr. and Mrs. Sabben a lunatic asylum at Stoke Newington was conveyed to trustees upon trust to sell the same with the goodwill thereof, and to stand possessed of the proceeds for the benefit of Mrs. Sabben and the children of the marriage. But it was declared that until the trust premises were sold it should be lawful for Dr. Sabben to carry on the business of an asylum upon the said premises without paying any rent for them other than the rents payable under the leases thereof, but paying to the trustees certain sums of money thereafter covenanted to be paid, namely, a sum of £10,000, payable by instalments, and the premiums on certain policies of insurance.

Dr. Sabben carried on the business of the asylum for his own benefit till July, 1875, when he filed a petition for liquidation, and a trustee was appointed. Immediately on the liquidation, Dr. H. E. Symons, the surviving trustee of the settlement, entered into the management of the asylum with a view, as alleged by the plaintiff, to the preservation of the business and to a sale thereof as a going concern under the trusts of the settlement. He carried on the business till April, 1876, when the asylum was sold for £18,500.

The plaintiff, J. R. Strickland, was an upholsterer at Gravesend, who had supplied the asylum while it was being carried on by Dr. Symons with furniture. A balance of £500 was due to him, for which sum, with interest and costs, he had recovered judgment in the Common Pleas Division against Dr. Symons. The money not having been paid by Dr. Symons, the plaintiff brought the present action against Dr. Symons and Dr. and Mrs. Sabben and their children, claiming to be paid the amount of his judgment debt out of the trust funds.

Mr. Baron Pollock gave judgment for the defendants, and the plaintiff appealed from the judgment.

Higgins, Q. C., and *Dauney*, for the appellant: —

Dr. Symons carried on the asylum for the benefit of the trust estate. If he had himself advanced the money for the furniture he would have been entitled to indemnity out of the trust funds. Even if he had not been a trustee he would have been entitled to be recouped any money which he advanced as salvor of the property. In either case the plaintiff is entitled to stand in his place and be paid out of the trust funds. The settlement directed that the asylum should be sold with the goodwill, so it was necessary to carry on the asylum in order to preserve the goodwill.[1]

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[1] 22 Ch. D. 666.

Dr. Symonds had no means out of which to pay the same 22 Ch. 666.68

[EARL OF SELBORNE, L.C., referred to Labouchere *v.* Tupper.[2]]

Barber, Q. C., and *Kirby*, for Mrs. Sabben, and *S. T. Moore*, for the other defendants, were not called on.

EARL OF SELBORNE, L.C. This action has been rightly described in the course of the argument as an action to enforce the plaintiff's lien, but you cannot enforce a lien without showing that it exists. There is no principle or authority for saying that if a trustee makes himself personally liable for goods the creditor thereby obtains a lien on the trust property. There is not the least authority for such an action as the present. It is an action for an equitable execution against the trust estate in respect of a judgment against the trustee. There is no evidence of any contract for any security on any part of this estate. There was only an ordinary contract for goods supplied to a person who happened to be a trustee. The mere fact that the customer was carrying on an asylum which was subject to a trust would not give the tradesman the right to be paid out of the trust fund. The trustees of the settlement with respect to the asylum were to sell it, with certain consents, and to deal with the proceeds of sale as therein mentioned, and there was a power that until the premises should be sold it should be lawful for Dr. Sabben to carry on the business of an asylum upon the premises for his own benefit, he making certain payments. This he did until July, 1875, when he got into difficulties, and became a liquidating debtor, and then Dr. Symons continued to carry on the asylum, and for the purposes of the business he contracted this debt. Nothing can be more plain than that on the face of the settlement there is no dedication or application of the trust property to any trade purposes, and no provision that the business was to be carried on by the trustees. It was argued that as it was intended that the asylum should be sold and the goodwill with it, it was intended that the goodwill should be preserved, and therefore it was necessary and proper that the trustee should continue to carry on the asylum after Dr. Sabben gave it up, for the purpose of preserving the goodwill. That might have been a very sound argument if used between the trustee and the *cestuis que trust* for the purpose of justifying him and showing that he was entitled to an indemnity. But that is not the question here. On this settlement it is clear that it was intended that the asylum should be carried on by Dr. Sabben and not by the trustees; and that if he did not carry it on, it should be sold with the goodwill. It is therefore impossible to compare the case with *Ex parte* Garland,[3] and *In re* Johnson,[1] and the other cases where there has been an express direction by the testator to carry on a business, and where he specially appropriated part of his property for that purpose. Those authorities proceed on this principle, that where a particular part of a trust estate is specifically dedicated to a particular purpose which involves trade debts and liabilities, it is a trust to use it for that particular purpose, and the trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose, and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned. But the authorities tend to limit that doctrine rather than to extend it. The case of *Ex parte* Garland shows that the creditor can only have recourse to the particular part of the property of which there has been such an express dedication; and the right cannot be extended beyond that, either in bankruptcy or in administration. And that applies even to cases in which the trustee has merely done his duty in carrying on the business, and where he may be entitled to an indemnity for the expenses incurred by him. *In re* German Mining Company[2] and Labouchere *v.* Tupper[3] are cases in which the distinction is laid down between the rights of trustees carrying on business to be indemnified for expenses *bonâ fide* incurred where there are no particular assets appropriated, and the rights of creditors. Under such circumstances the creditors have no rights against the trust estate. The doctrine contended for by the appellant is not only not supported by *Ex parte* Garland, but is opposed to it. The appeal must therefore be dismissed with costs.

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[1] *In re* Johnson; Attorney-General *v.* Corporation of Norwich, 2 My & Cr. 406; Bright *v.* North, 2 Ph. 216; *In re* Leslie, 23 Ch. D. 552; Owen *v.* Delamere, Law Rep. 15 Eq. 134; *Ex parte* Garland, 10 Ves. 110; *Ex parte* Edmonds, 4 D. F. & J. 488; Fraser *v.* Murdoch, 6 App. Cas. 855.

[2] 11 Moo. P. C. 198.

[3] 10 Ves. 110.

COTTON, L.J. I agree, for the reasons stated by the Lord Chancellor.

FRY, L.J. I also agree, for the same reasons.

M. O. H. NORTON AND ANOTHER *v.* A. J. PHELPS AND ANOTHER.

IN THE SUPREME COURT, MISSISSIPPI, APRIL, 1877.

[*Reported in* 54 *Mississippi Reports*, 467.]

APPEAL from the Chancery Court of Washington County.

Hon. E. STAFFORD, Chancellor.

On April 17, 1869, M. O. H. Norton & Co. filed this bill against A. J. Phelps and his wife Mary B. Phelps, formerly Vick, to subject a plantation in their possession to an account for supplies and money advanced to Henry W. Vick and Jonathan Pearce, trustee, for the plantation, Henry W. Vick, and Mary B. Vick, the *cestui que trust.* The trustee Pearce was not made a party to the suit until 1870. In 1850 Sarah Vick conveyed the plantation to Pearce in trust, as indicated in the opinion. Henry W. Vick having died in April, 1861, Pearce took possession of the place in the following June, and became guardian of Mary B. Vick, the *cestui que trust*. On Nov. 28, 1865, Pearce, as guardian and trustee, exhibited to the Probate Court his account, showing that the estate was indebted to him $5,000, and to Norton & Co. $10,000, composed of $6,000 contracted by Henry W. Vick, and $4,000 contracted by himself in the course of his guardianship. This account, having been exhibited to Mary B. Vick after she became of age and before she married, was approved by her; and Pearce being discharged as guardian, surrendered the plantation to her, and became a non-resident of this State. On Oct. 3, 1866, Norton & Co. rendered Pearce an account of that date, showing a balance of $7,631.16, which he admitted to be "correct, due and owing." This account was exhibited to Mary B. and A. J. Phelps, who admitted it to be a proper charge against them, and a liability for which the trust estate was bound. The complainants appealed from a final decree on the merits dismissing the bill.

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[1] 15 Ch. D. 548.

[2] 4 D. M. & G. 19.

[3] 11 Moo. P. C. 198.

Nugent & McWillie, for the appellants.

W. G. Phelps, for the appellees.[1]

CAMPBELL, J., delivered the opinion of the court.

In the case of Clopton *v.* Gholson,[2] we announced the principles applicable to this case. These are, that persons dealing with a trustee must look to him for payment of their demands, and that, ordinarily, the creditor has no right to resort to the trust estate to enforce his demand for advances made or services rendered for the benefit of the trust estate. But while this is the rule, there are exceptions to it, and where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee, or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or non-resident, so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery. The principle is, that while persons dealing as creditors with the trustee must look to him personally, and not to the trust estate, yet where the estate has received the benefit of expenditures procured to be made for it by the trustee, and it has not in any way borne the burden of these expenditures properly chargeable to it, and to fasten the charge upon it will do it no wrong, but simply cause it to pay what it is liable for to the trustee, or would be liable for if he had paid it, or should pay it, and because of the insolvency or non-residence of the trustee, our tribunals cannot afford the creditor a remedy for his demand, he may proceed directly against the trust estate, and assert against it the demand the trustee could maintain, if he had paid or should pay the claim, and should himself proceed against the trust estate. Generally the trustee alone must be looked to. He stands between the creditor and the estate. He represents the estate, and deals for it. He is entitled to be reimbursed out of the trust estate for all disbursements rightfully made by him on account of it, and creditors must get payment from him; but when they cannot do that, and it is right for the trust estate to pay the demand, and it owes the trustee, or would owe him if he had paid or should pay the demand, the rule, founded in policy, which denies the creditor access to the trust estate, yields to the higher considerations of justice and equity; and, in order that justice may be done, the creditor may be substituted, as to the trust estate, to the exact position which the trustee would occupy if he had paid or should pay the demand, and seek to obtain reimbursement out of the estate. Applying these principles to the facts of this case, it will be found that they bring it within the exception stated.

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[1] The arguments of counsel are omitted. — ED.

[2] 53 Miss. 466.

Clearly, if Pearce, the trustee, had paid, or should pay, under a recovery against him, the demand sought to be enforced against the trust estate, he would be a creditor of the estate. He is a non-resident of the State of Mississippi, where the trust property is and where the debt was contracted, and the creditor has the same rights, because of this, as to the trust property, as if Pearce was insolvent. The reason why insolvency of the trustee is an element in the combination of circumstances admitting the creditor to proceed against the trust estate is because of the inability of the courts to coerce an insolvent person to pay his liabilities; and the same considerations apply, ordinarily, in the case of the non-residence of the trustee, without regard to his pecuniary condition; for a creditor seeking the aid of our courts should not be dismissed because he might pursue a person to a foreign land, and there have a recovery against him. If he cannot obtain justice through our courts except by departing in an exceptional case from a rule of policy, to secure justice the departure should be made. "Trustees have an inherent right to be reimbursed, all expenses properly incurred in the execution of the trust, and no express declaration in the trust instrument is requisite to create that right." Hill on Trustees, 570 *et seq.*; 2 Perry on Trusts, § 910. The trust-deed in this case vests the title of the property in Pearce as trustee, providing that he "is to permit the said Henry W. Vick, as agent for said trustee, . . . to superintend, possess, manage, and control said property," &c., "with power to sell and exchange," &c. This conferred very large powers for incurring expenditures to be borne by the trust estate. Hill on Trustees, 571, 572. Vick was thus constituted the agent of the trustee for the very purpose of possessing, managing, and controlling the trust property. Debts properly made by Vick, agent and co-trustee, as he is elsewhere in the deed called, in the management of the trust property, were the debts of Pearce, the trustee, with this qualification; namely, that he is exempted by the deed from responsibility personally for the acts or conduct of Vick.[1] *Decree reversed and cause remanded.*

FAIRLAND *v.* PERCY AND OTHERS.

IN THE COURT OF PROBATE, FEBRUARY 9, 1875.

[*Reported in Law Reports, 3 Probate & Divorce,* 217].

SIR J. HANNEN.[2] In this case the plaintiff claims to be a creditor in equity of the estate of Robert Percy, deceased, and as such creditor asks for administration (with the will annexed) of the unadministered personal estate of the deceased. The testator, by his will dated the 9th of March, 1868, appointed William Peacock and Henry Fenwick trustees and executors, and gave, devised, and bequeathed to his said trustees all his real and personal estate upon trust to permit and suffer his wife to receive the rents and profits and to carry on his business as a tailor for the term of her natural life, if she should so long remain his widow, and from and after the decease or second marriage of his said wife he directed the trustees to sell and convert into money all parts of his estate not consisting of money, and to divide the proceeds amongst his children as tenants in common. William Peacock and Henry Fenwick refused to accept the trusts of the will, and duly renounced probate, and thereupon administration with the will annexed of the personal estate and effects of the deceased was granted to the widow, who, under the authority given to her to carry on the business, continued to do so down to the time of her death in January, 1874. She did not marry a second time. While she so carried on the business, the plaintiff and his partner (trading under the style of Stott & Co.) supplied goods to the widow in the way of the said trade of a tailor, to the amount of £399 16*s.* 4*d.*, and this debt remains wholly unpaid, and the plaintiff and his partner hold no security for any part of it. The plaintiff claims in respect of this debt to be an equitable creditor of the estate of Robert Percy, deceased. All parties interested in the estate of the deceased have been cited, but do not appear. It appears that Martha Percy, the widow of the deceased, died wholly insolvent, and left no property out of which the plaintiff's debt can be satisfied. There can be no doubt that Martha Percy was originally the legal debtor of the plaintiff's firm, and that had she or her estate been solvent they would have been bound to look to her or her estate for payment, and that no claim could have been made against the estate of the deceased.[1] But the cases cited in argument show that where a testator by his will directs that his business may be carried on, and that his personal estate shall be used as capital with which to do so, the persons who after his death become creditors of the business, in addition to the personal responsibility of the individuals who give the order for the goods or otherwise contract the debt, are entitled in equity to claim against the estate of the testator, to the extent that he authorized it to be used in the business.[2]

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[1] Askew *v.* Myrick, 54 Ala. 30; Dickinson *v.* Cunniff, 65 Ala. 581; Mundon *v.* Bailey, 70 Ala. 63; Blackshear *v.* Burke, 74 Ala. 239; Moseley *v.* Norman, 74 Ala 422; Habersham *v.* Huguenin, R. M. Charlt. 376; Wylly *v.* Collins, 9 Ga. 223; Satterwhite *v.* Beall, 28 Ga. 525; Gandy *v.* Babbitt, 56 Ga. 640 (*semble*); Malone *v.* Buice, 60 Ga. 152; Robert *v.* Tifft, 60 Ga. 566; Kuperman *v.* McGehee, 63 Ga. 250; Jackson *v.* Poole, 73 Ga. 801; Greenfield *v.* Vason, 74 Ga. 126; Clopton *v.* Gholson, 53 Miss. 466; (compare Pool *v.* Ellis, 64 Miss. 555); Bushong *v.* Taylor, 82 Mo. 660; Cater *v.* Everleigh, 4 Dess. 19; James *v.* Mayrant, 4 Dess. 591; Montgomery *v.* Everleigh, 1 McC. 267; Douglas *v.* Frazer, 2 McC. Ch. 105; Guerry *v.* Capers, Bail. Eq. 159, 162; Manigault *v.* Deas, Bail. Eq. 283, 290; Henshaw *v.* Freer, Bail. Eq. 311, 317, 318; Magwood *v.* Johnson, 1 Hill. Ch. 224; Tennant *v.* Stoney, 1 Rich. Eq. 222, 263; Adams *v.* Mackey, 6 Rich. Eq. 75; Owens *v.* Mitchell, 38 Tex. 588 *Accord.*

It is recognized in most of the cases cited in the preceding paragraph that the creditor's recovery against the trust estate will be defeated in whole or in part if the trustee is in arrears to the trust estate. But in Wylly *v.* Collins, 9 Ga. 223, Manderson's App. 113 Pa. 631, the creditor was allowed to charge the trust estate, although the trustee was a defaulter to an amount exceeding the creditor's claim.

See 15 Am. L. Rev. 449 for a discussion of the question involved in the cases cited in this note. — ED.

[2] See *supra,* 70, n. 1. — ED.

In Ga. Cr. has remedy
v. trust est at law – 92 Ga. 1

This is clearly laid down by Lord Eldon in *Ex parte* Garland:[3] "As to creditors subsequent to the death of the testator, in the first place, they may determine whether they will be creditors. Next, it is admitted they have the whole fund that is embarked in the trade, and in addition they have the personal responsibility of the individual with whom they deal, the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate embarked in the trade. They have not a lien upon anything else." The same principle is laid down in the other cases, the only one of which I need refer to is that of Owen *v.* Delamere,[4] recently decided by Sir J. Bacon, V. C. In that case a creditor of a business, carried on after the death of a testator with a portion of his estate in accordance with the directions of his will, filed a bill for the administration of the testator's personal estate, as in a creditor's suit. This bill was dismissed by the Vice-Chancellor on the ground that as it appeared that the persons who carried on the business and had contracted the debt were solvent, the plaintiff's remedy was by action at law against them, and not by an administration suit in the Court of Equity. And the Vice-Chancellor more than once points out that the case would be different if, as in the present case, the person primarily liable were insolvent. He says: "An executor authorized to carry on a business, who carries it on, is liable for every shilling on every contract he enters into; besides that, if he becomes bankrupt, the persons who have trusted him have a right to say that that portion of the trust estate which was committed to him for the purpose of carrying on the business shall not be the subject of general administration." And again: "There can be no doubt about the principles on which a Court of Equity deals with such a case: the Court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to the purposes of the trust that estate which the testator designated and directed to be employed for that purpose. As Lord Eldon points out in *Ex parte* Garland,[1] the creditor has not only the personal remedy against the executor, but he has a right also, if that should fail, to come against the trust estate: and so here, if an action had been brought against the defendants, and a fruitless judgment had been recovered against them, there would have been a right to go against the trust estate which the testator committed to the executors if it should be in existence in specie." I think that these passages establish that the plaintiff, in the existing state of facts, is an equitable creditor of the personal estate of Robert Percy, the deceased, in respect of the debt which the testator's widow contracted in the course and for the purpose of carrying on the business. In arriving at the conclusion that administration may be granted to the plaintiff as an equitable creditor, I am fortified by the decisions in analogous cases where administration has been granted to persons as creditors of a deceased's estate in respect of debts not contracted by the deceased or in his lifetime. I allude to the cases of undertakers and those who have been at the expense of burying the deceased: Spitty's Case;[2] Newcombe *v.* Beloe.[3] It will be seen that my decision is based on the assumption that the estate of Martha Percy, the widow, is insolvent. As no opposition has been offered to the motion, the fact of this insolvency rests on the affidavit of the applicant; but though the estate may be insolvent, it is highly improbable that it is absolutely nil. On the contrary, it is highly probable that there must be some trade debts due to the widow, and not to the estate of her deceased husband; and, further, it is possible she may have other creditors than trade creditors. I think, therefore, it is necessary that the plaintiff should in the first place, as a legal creditor of the widow, take out administration to her estate. And further, as the interests of persons not before the Court may be affected, I shall impose the condition that justifying security be given.

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[1] Owen *v.* Delamere, 15 Eq. 134; Laible *v.* Ferry, 32 N. J. Eq. 79 *Accord.* — Ed.

[2] *Ex parte* Garland, 10 Ves. 110; *Ex parte* Richardson, 3 Mad. 138; Thompson *v.* Andrews, 1 M. & K. 116; Cutbush *v.* Cutbush, 1 Beav. 184; *Ex parte* Butterfield, De Gex, 570; McNeillie *v.* Acton, 4 D. M. & G. 744; *Ex parte* Westcott, 9 Ch. 626; Owen *v.* Delamere, 15 Eq. 134; *Re* Sumner, W. N. (1884), 121; *Re* Firmin, 57 L. T. Rep. 45; Scholefield *v.* Eichelberger, 7 Pet. 586; Burwell *v.* Cawood, 2 How. 560; Smith *v.* Ayer, 101 U. S. 320; Jones *v.* Walker, 103 U. S. 444; Cook *v.* Administrator, 3 Fed. Rep. 69; Edgar *v.* Cook, 4 Ala. 588; State *v.* Hunter (Ark., 1892), 19 S. W. R. 496; Pitkin *v.* Pitkin, 7 Conn. 307; Blodgett *v.* American Bank, 49 Conn. 9; Wilson *v.* Fridenburg, 21 Fla. 386; Stanwood *v.* Owen, 14 Gray, 195; Bacon *v.* Pomeroy, 104 Mass. 577, 585; Mason *v.* Pomeroy, 151 Mass. 164; Hagan *v.* Barksdale, 44 Miss. 186; Brasfield *v.* French, 59 Miss. 632; Laible *v.* Ferry, 32 N. J. Eq. 791; Willis *v.* Sharpe, 113 N. Y. 586; Stewart *v.* Robinson, 115 N. Y. 336; Delaware Co. *v.* Gilbert, 44 Hun, 201; Lucht *v.* Behrens, 28 Oh. St. 231; Gratz *v.* Bayard, 11 S. & R. 41; Mathews *v.* Stephenson, 6 Pa. 496; Laughlin *v.* Lorenz, 48 Pa. 275; Davis *v.* Christian, 15 Grat. 11 *Accord.* — Ed.

[3] 10 Ves. 110.

[4] Law Rep. 15 Eq. 134.

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[1] 10 Ves. 110.

[2] Coote's Practice of the Court of Probate, 6th ed. p. 94.

[3] Law Rep. 1 P. & M. 314.

IN RE JOHNSON.

SHEARMAN *v.* JOHNSON.

IN THE HIGH COURT OF JUSTICE, CHANCERY DIVISION, JULY 19, 1880.

[*Reported in* 15 *Chancery Division,* 548.]

ADJOURNED SUMMONS. Peter Johnson, by his will, dated the 27th of May, 1873, appointed the defendant Robinson and another his executors; and, after making certain specific and pecuniary bequests, and directing the payment of his debts, and funeral and testamentary expenses, he directed his executors, as soon as might be after his decease, to collect, get in, and receive all debts owing to him in respect of the business of a tailor and robe-maker then carried on by him at Cambridge, and also all other debts owing to him not connected with the business then carried on by him in London in partnership with Thomas Sadler, and (subject to the provisions thereinafter contained) to sell and convert into money all his Cambridge stock in trade, and stand possessed of the proceeds, and all other his personal estate and effects whatsoever (except his share and interest in the London business) not thereinbefore specifically bequeathed, upon trust to pay one equal fourth part thereof to and amongst such of the children of his deceased sister Catherine Neill (including his nephew John Neill) as should be living at the time of his decease; one other equal fourth part to the plaintiff; and the remaining two fourth parts to the several persons therein named. And the testator declared that in case his nephew John Neill should be under the age of twenty-one years at the time of his decease, it should be lawful for his said executors, upon the request of the said John Neill, to postpone the sale of his Cambridge stock in trade and allow his said business of a tailor and a robe-maker at Cambridge to be carried on by the said John Neill, for his own benefit, under the supervision of his said executors, until such time as the said John Neill should attain twenty-one, and during such period should use such part of the share of the said John Neill in his residuary personal estate as might be requisite for the due carrying on of the said business. And he directed, in case that provision was carried into effect, that an inventory and valuation of all his stock in trade at Cambridge should be taken immediately after his decease, and that on the said John Neill attaining his age of twenty-one years he should have the option of taking the then existing stock at the amount of such valuation, and that if he declined to do so, and the said stock was sold, then the said John Neill should bring the amount of the proceeds of such sale into hotchpot on the calculation for the distribution of the residuary personal estate. The testator then gave certain directions as to the winding up of his partnership in the London business, and directed that his share and interest therein should fall into his residuary personal estate.

The testator died on the 25th of November, 1875, and his will was proved by the defendant Robinson alone, the other executor having renounced. There were living at the testator's death two children of his deceased sister Catherine, one of whom was the said John Neill, then an infant.

After the testator's death the defendant did not get in the book debts of the Cambridge business as directed by the will, but he continued to carry on the business in his own name until the 30th of June, 1878, when John Neill attained twenty-one; he also continued the management of the testator's share in the London business. For the purpose of carrying on the Cambridge business, the defendant advanced from time to time several sums of money out of John Neill's share in the testator's personal estate, which sums were repaid out of the business in the ordinary course of carrying it on, but the defendant kept no separate banking account for the business.

An action having been instituted by one of the residuary legatees, and a judgment obtained for the administration of the testator's estate, it was found, on taking the defendant's accounts, that there was due from him a balance of £764, 16*s.* 1*d.* in respect of profits from the Cambridge business, and also a balance of £1,668, 3*s.* 1*d.* in respect of the general personal estate of the testator, including his share in the London business.

Amongst the creditors who made claims against the estate under the judgment were several persons who had supplied the defendant with goods in the course of his carrying on the Cambridge business subsequently to the testator's death; but these claims being disallowed by the chief clerk, summonses were taken out by three of these creditors for the purpose of establishing their claims. One of the summonses was by a firm of Standen & Co., woollen warehousemen, and asked that a sum of £460 5*s.* 10*d.* due to them for goods sold and delivered to the defendant, the executor, in the course of his carrying on the trade or business of a tailor from the time of the testator's death down to the 30th of June, 1878, might be forthwith paid to them by the said executor out of the share of the said John Neill in the testator's residuary personal estate; or otherwise that it might be declared that the applicants were entitled to a lien on the portion of the estate of the said testator which on the 30th of June, 1878, was embarked in the carrying on as aforesaid of the said testator's business; and that an inquiry might be directed for the purpose of ascertaining what were the assets of the said testator which were so subject to the lien of the applicants.

The two other summonses, which were by creditors for an aggregate amount of upwards of £600, asked that they might be at liberty to bring in their claims against the assets of the business carried on by the defendant under the powers of the will, in respect of debts incurred by him to the applicants in the course of such business, and that such assets might be applied in payment of what should be found due to the applicants in respect of their debts. Upon the further consideration of the action all three summonses came on for hearing.

It appeared that the defendant, the executor, was insolvent.

Grosvenor Woods, for Messrs. Standen's summons.[1]

Speed and *Maidlow*, for the other two summonses.

R. F. Norton, for Neill, was not called upon.

E. W. Byrne, for the plaintiff.

Seward Bryce and *E. C. Austin*, for other parties.

The defendant did not appear by counsel.

JESSEL, M. R. I shall dismiss these summonses, but I will give the creditors liberty to present a petition. I will not distribute the assets until they have presented a petition: that seems to me the regular course, but at present I do not see that they are entitled to anything. That seems to have been the course taken in several cases, and I think it is the right course, for the creditors are not parties to this suit at all. They ought to come in under a petition. With regard to the point that has been argued, I understand the doctrine to be this, that where a trustee is authorized by a testator, or by a settlor, — for it makes no difference, — to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, "I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade." The first right is his general right by contract, because he trusted the trustee or executor: he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; therefore the court says to him, You shall not set up a trustee who may be a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade: the court puts the creditor, so to speak, as I understand it, in the place of the trustee. But if the trustee has wronged the trust estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts has put them into his own pocket, then it appears to me there is no such equity, because the *cestuis que trust* are not taking the benefit.

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[1] The argument of *Woods* is omitted. — ED.

The trustee having pocketed the money, the title of the creditor, so to speak, to be put in the place of the trustee, is a title to get nothing, because nothing is due to the trustee. It does not appear to me that in that case the creditor, who has never contracted for anything, who has only got the benefit of this equity, if I may say so, by means of the trustee, through the lucky accident of there being a trust, ought to be put in a better position than any other creditor. I do not see that any judge has said so.

If we start with *Ex parte* Garland, what Lord Eldon says is this: "It is admitted they [the creditors] have the whole fund that is embarked in the trade" — that is, as between themselves and the executors the creditors can claim the application of the fund; "and in addition they have the personal responsibility of the individual with whom they deal: the only security in ordinary transactions of debtor and creditor." [His Lordship then read down to the words "security for the creditors on the trade,"[1] and continued:] Then,[2] after expressing his strong opinion that only the property declared to be embarked in the trade should be answerable to the creditors of the trade, he says, "If I am not bound by decision, the convenience of mankind requires me to hold that the creditors of the trade, as such, have not a claim against the distributed assets, in the hands of third persons under the direction of the same will, which has authorized the trade to be carried on for the benefit of other persons." That does not decide the point I have mentioned at all. All that it decides is that the claim of the creditors is limited to the assets devoted to trade. What their right against those assets is, Lord Eldon does not decide.

Then we have a case which I think comes nearest to the present case, *Ex parte* Edmonds.[3] Lord Justice Turner says this:[4] "The case of *Ex parte* Garland and the other cases referred to in the argument have not, in my opinion, any application to the present case. They proceed upon the principle that the executor or trustee directed to carry on the business having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and thus become creditors of the fund to which the executor or trustee has a right to resort."

Having read those two authorities, which, being the decisions of a Lord Chancellor and of the Court of Appeal in Chancery, would be binding on me, I need only say that I do not think the point arises in any of the subsequent cases, or was the subject of consideration in them. Owen *v.* Delamere,[5] which contains a mere dictum of Vice-Chancellor Bacon, but still of course entitled to great respect if it did differ — which I do not think it does — from what Lord Justice Turner laid down in *Ex parte* Edmonds[6] as the true principle, would not be binding upon me; but I do not think it is different, because Vice Chancellor Bacon is directing his attention to the point decided in *Ex parte* Garland, that is, that the creditors have no right to go beyond assets devoted to trade. The nature of the right as against those assets is not adverted to; that is plain; for after saying that *Ex parte* Garland "contains a clear, distinct, and luminous exposition of law on the subject," — which it does upon the point that it is not the general estate of the testator which is liable, but only so much as he has authorized to be employed in the business, — the Vice Chancellor says,[1] "The court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to purposes of the trust that estate which the testator designated and directed to be employed for that purpose." It is merely repeating *Ex parte* Garland without the slightest reference to the mode in which the claim is to be enforced.

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[1] 10 Ves. 121.
[2] 10 Ves. 122.
[3] 4 D., F. & J. 488.
[4] 4 D., F. & J. 498.
[5] Law Rep. 15 Eq. 134.
[6] 4 D., F. & J. 488.

The same may be said of the case of Fairland *v.* Percy. I dispose of that by saying that Sir James Hannen goes no further, and that he does not consider the second point at all.

The question raised by the second point — that is, what is the right to resort — is not treated of, as far as I can see, in any reported decision except in the case of *Ex parte* Edmonds. I think it is inferentially referred to in Mr. Justice Lindley's book, where I think he means to say the same that Lord Justice Turner said, although I must say, with great deference to Mr. Justice Lindley, it might have been more clearly put. Nothing can be clearer than the way in which Lord Justice Turner puts it; it is simply, as he says, the right to resort for indemnity to the assets actually directed to be employed; and the creditor is entitled to the benefit of that right.

What Mr. Justice Lindley says is this:[2] [His Lordship then read the passage commencing, "If an executor of a deceased partner," and ending, "lien on the assets of the deceased employed therein," and continued:]

I am not sure that Mr. Justice Lindley had in view the remarks of Lord Justice Turner in *Ex parte* Edmonds,[3] for he does not cite the case; but he may have arrived at the same conclusion independently.

The only other text-book that I have been looking at on this point is the last edition of Williams on Executors.[4] After stating that a trade is not transmissible, but is put an end to by the death of the trader, it says: "Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the will contains a direction that they should continue the business of the deceased." Then it says,[5] "The testator may, by his will, qualify the power of his executor to carry on trade, and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose; and then in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation." Although the author cites *Ex parte* Garland, he does not appear to me to deal directly with the question I have to deal with, which is, What is the nature of the right of the creditors against the assets specifically appropriated by the testator for the purpose of carrying on the trade? I am therefore really thrown back on the authority of Lord Justice Turner. If the right of the creditors is, as is stated by Lord Justice Turner, the right to put themselves, so to speak, in the place of a trustee, who is entitled to an indemnity, of course if the trustee is not entitled, except on terms to make good a loss to the trust estate, the creditors cannot have a better right. They do get some additional benefit so as to avoid a supposed injustice; but the injustice to be avoided is the injustice of the *cestui que trust* walking off with the assets which have been earned by the use of the property of the creditor; but where the *cestui que trust* does not get that benefit, there is no injustice as between him and the creditors, and there is no reason for the court interfering at the instance of the creditors to give them a larger right than that they bargained for, namely, their personal right against the trustee. It appears to me, therefore, that if the trustee has no such right in such a case, they have none here.

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[1] Law Rep. 15 Eq. 139.

[2] Lindley on Partnership (3d ed.), p. 1103.

[3] 4 D., F. & J. 488.

[4] 8th ed. p. 1798.

[5] Page 1800.

The particular case before me is peculiar. It appears by the evidence, and it is the fact, that the executor carried on the Cambridge business in his own name and not in the name of the infant, which was strictly in accordance with the terms of the will, for I do not suppose he could carry it on in any other way. By the will the testator allowed him to make use of one-eighth of the residue for the purpose of carrying on the business on behalf of the legatee, who was an infant of the name of Neill, during his minority; then Neill, on his attaining twenty-one, was to be allowed to take the stock in trade, if he thought fit, not at its then value, but at its value at the testator's death, and all the rest fell into residue. But the executor and trustee did not follow the will, for, as I said before, he carried on business in his own name as executor, and used the assets then in the business. He did not do what the testator told him to do, namely, collect the book debts and throw them into general residue with the business, and then make use of one-eighth of the residue; he kept no separate banking account so as to show the actual sums of money used in the business, but he carried on the business as it had been carried on before. Whether that makes any difference or not it is immaterial now to inquire, but that is what he actually did. He carried on the business, and in carrying it on he received £764 16*s*. 1*d*. more profit than he has accounted for, and this amount he owes the estate. Besides that, he was carrying on the London business belonging to the estate. From that and other sources he has received £1,668 3*s*. 1*d*. more than he has accounted for; so that he is a very large defaulter. It is manifest that he could not take one penny out of this estate by way of indemnity until he made good his default.

Therefore, unless the creditors can be in a position to show — as to which there is no evidence before me — that there were profits from carrying on the business to an amount exceeding the deficit, so that something was gained by the use of these assets, it does not appear to me that they can be entitled to anything.

As the facts on this point do not appear, I will give the creditors liberty to present a petition within a limited time, if they think they can support it, and I will not allow the assets to be distributed until they have had time to present their petition. I do not think it is a case to make the creditors pay costs.

The summonses are, therefore, dismissed without costs.[1]

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[1] *Ex parte* Edmonds, 4 D., F. & J. 488, 498 (*semble*); *Re* Morgan, 18 Ch. D. 93, 99 (*semble*); *Re* Evans, 34 Ch. Div. 597; *Re* Gordon, 40 Ch. Div. 536; Mason *v.* Pomeroy, 151 Mass. 164 (*semble*); Cock *v.* Carson, 45 Tex. 429 (*semble*) *Accord.* See also Collinson *v.* Lister, 7 D., M. & G. 634. — Ed.

A trustee may stipulate by apt words that he shall not be liable personally, but only out of the trust moneys. In such a case the promisee cannot charge the trustee *de bonis propriis.* But he may reach the trust funds if the circumstances were such as to justify the trustee in pledging them for the benefit of the trust. Muir *v.* Glasgow Bank, 4 App. Cas. 337, 361, 365, 368, 369–70, 377, 386, 388; Campbell *v.* Gordon (Ct. of Sess., 1840), 2 D. 639; Johnson *v.* Leman, 30 Ill. App., 370; Glenn *v.* Allison, 58 Md. 527; Noyes *v.* Blakeman, 6 N. Y. 567; New *v.* Nicholl, 73 N. Y. 127; Perry *v.* Board, 102 N. Y. 99; Van Slyke *v.* Buch, 123 N. Y. 47; Stanton *v.* King, 8 Hun, 4; Fowler *v.* Mut. Co., 28 Hun, 195; Randall *v.* Dusenbury, 39 N. Y. Sup'r Ct. 174. — Ed.

SECTION VII. (*continued*).

(*b*) CREDITORS OF CESTUI QUE TRUST.

LORD GREY AND OTHERS *v.* COLVILE AND OTHERS.

IN CHANCERY, BEFORE LORD FINCH, C., 1678.

[*Reported in* 2 *Reports in Chancery*, 143.]

IN CHANCERY, BEFORE SIR FRANCIS NORTH, K., JUNE 15, 1683.

[*Reported in* 1 *Vernon*, 172.]

THE plaintiff the Lady Grey's bill is to be relieved for a debt of £1,500 and interest on bond, wherein John Colvile did bind himself and his heirs to repay the same unto the plaintiff, her executors and assigns, that the same might be paid out of the lands which were purchased by the said John Colvile with his own proper money, in the names of himself and the defendant's wife, to hold to them two for their lives, and then to the heirs of Colvile, and the rest were purchased in the names of the said defendants Morriss and Saunders in trust for the said John Colvile and his heirs; that soon after and before the £1,500 was paid the said John Colvile died, and the right and equity of the premises during the life of the said defendant's wife is in Josia Colvile, and the reversion in fee after the death of the said wife will descend to the said defendant, Josia Colvile, as son and heir of the said John Colvile, and the profits are received by him or for his use; that the said John Colvile dying intestate, administration is granted to Dorothy, his relict, who pleads she hath no personal estate, whereupon the Lady Grey commenced a suit at law, by filing an original for her said debt against the defendant Josia, as son and heir of the said John Colvile, and hath got judgment thereon to have satisfaction for the said debt, out of the reversion of the lands of Josia, which descended in fee to the said defendant Josia Colvile, and ought to have satisfaction accordingly, but the said defendant Josia pretendeth he hath nothing by descent in present but the reversion of the lands purchased in the names of John Colvile and his wife, after the death of his wife, whereas, he and the other two defendants were only trustees for John Colvile and his heirs, and their trust being now come to the defendant Josia, they are liable as assets in equity for satisfaction of the plaintiff's debts, and the plaintiff ought to be let into the immediate possession; and the said Josia also insists that the premises are incumbered by a former judgment of one lease for £800, and the plaintiffs creditors and others the creditors in their suit, seeking relief against the same defendants, upon the same trust and equity, and to have their debts paid out of the said lands, they insisting they are creditors by judgment, grounded on original of the same day and date with the said Lady Grey, and ought to be satisfied in equal degree and time.

The plaintiff Creed and the other creditors insist, that they for so much as the estate in law of wife is in the heir, that their judgments ought to attach the lands according to priority of originals, and though the said Leke hath obtained a decree prior to the creditors in these suits, yet the same is to be subject to the direction of this court, and ought not to take place, but according to the date of their originals.

This court (it being admitted by all that the original on which the said Leke's judgment is grounded, is prior to all the other creditors' originals, and that the plaintiff, the Lady Grey, and Creed's originals are next in priority, and bear the same date one with another, and ought next to be satisfied with other judgments, who originally bear the same date) declared that the estate purchased in the names of the defendant's wife as aforesaid was a trust for life, attending the reversion, and so liable to make the several plaintiffs satisfaction for their debts, and should be enjoyed by the plaintiffs against the said wife and Josiah Colvile the heir; and the court decreed that if the estate of wife as aforesaid was not sufficient, then the said reversionary lands purchased in the names of the said Morris and Sanders, after the death of Sir John Tufton, who hath an estate for life in the said lands, should go towards satisfaction of the said debts.

June 15, 1683. The single point of this case was, whether the trust of an estate in fee descended upon the heir is liable in equity to the satisfaction of a debt by bond, wherein the heir is expressly bound.

The late Lord Chancellor had decreed it assets; but upon a rehearing before the Lord Keeper he seemed doubtful.

For the heir against the decree it was said that this point had formerly been settled upon great advice in the case of Box and Bennet,[1] which was heard by the Lord Chancellor, with the assistance of the Lord Chief Justice Hales and Mr. Justice Wadham Windham.

But for the decree it was argued that the precedent of Box and Bennet was looked upon as a hard case, and had never carried any great authority with it, it being a precedent of the judges' making, who look upon the court of chancery as precarious in its jurisdiction, and therefore, as much as may be, are for restraining it to the rules of law; but a trust, being a creature of this court, ought to be governed solely by the rules of equity, and equity ought to be conformable throughout; and therefore why should not the trust of an inheritance be assets as well as the trust of a term? An equity of redemption is every day made assets in equity;[2] and what reason can be given why in equity a

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[1] 1 Ch. Ca. 1.

[2] Plucknet *v.* Kirk (1686), 1 Vern. 411; Cole *v.* Warden (1686), 1 Vern. 410; Solley *v.* Gower (1688), 2 Vern. 61; Anon. (1690), Freem. C. C. 115, *Accord.* In Solley *v.* Gower, *supra*, the court said:—

"The equity of redemption of an inheritance is not assets at law, because the estate trust of an inheritance should not be assets, where the inheritance itself, had it not been in trust, would have been assets at law?[1]

Lord Keeper. I know the case of Box and Bennet has had hard words given it, and been much railed at; but the decree in that cause was made upon great advice, and he did not know how he could be better advised now, and said, there was a difference between the case of an heir and the case of an executor; and therefore the trust of a term and the trust of an inheritance are not the same thing, as to this point; for whatever money comes to the hands of the executor, either by sale of the term, or if money be decreed to him in this court, will be assets: but if an heir, before an action brought, sells and aliens the assets, the money is not at law liable in his hands, unless the sale were with fraud or collusion; as if an heir sell and buy again, there the new purchased lands will be assets. And as to an equity of redemption, he said that if a man had a mortgage and a bond, before the mortgage should be redeemed by the heir the bond ought to be satisfied; but he did not know that an equity of redemption should be assets in equity to all creditors, and mentioned Mr. Baron Weston's case against Mrs. Danby.

As to the case in question, his Lordship said he would not throw such a cause out of court without good consideration first had, and that he should be much governed by the precedent of Box and Bennet, unless they could show that the latter precedents had been otherwise; and directed them to attend him with precedents towards the latter end of the term.[2]

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is forfeited; but the heir having a right in equity, that ought in equity to be liable to satisfy a bond debt."

A mortgagee, who was also the holder of an unsecured specialty claim against the mortgagor might, in order to avoid circuity of action, tack the latter to his mortgage in a suit by the heir of the mortgagor to redeem the mortgage. This was allowed, obviously, only because the equity of redemption was assets in the hands of the heir. Windham v. Jennings (1683), 2 Ch. Rep. 247; Shuttleworth v. Laycock (1684), 1 Vern. 244; Anon. (1684), 2 Ch. Ca. 164; Coleman v. Winch (1721), 1 P. Wm. 775; Powis, v. Corbet (1747), 3 Atk. 556; Troughton v. Troughton (1747), 1 Ves. Sr. 87.

Similarly, and for the same reason, a mortgagee of personalty is allowed to tack other claims against the mortgagor in a suit for redemption brought by the latter's executor. Anon. (1690), 2 Vern. 177; Eccles v. Thewill (1690), Prec. Ch. 18; Demandray v. Metcalf, Prec. Ch. 419, 2 Vern. 691, S. C.; Coleman v. Winch, 1 P. Wm. 775, 777; Vanderzee v. Willis, 3 Bro. C. C. 21 (*semble*). — Ed.

[1] The arguments and opinions are slightly abridged. — Ed.

[2] Reg. Lib. 1682, A, fol. 818. This cause came on again the 14th of December, when an order was made for the parties to attend the two Lords Chief Justices and Lord Chief Baron, who were thereby desired to certify their opinion on the question. Reg. Lib. 1683, A, fol. 166. Afterwards in Michaelmas Term, 1684, upon motion of the defendants, it was ordered that unless plaintiffs, the creditors, procured the certificate of Lord Chief Justices' and Lord Chief Baron's opinion, by the first day of the next term, the bill should be dismissed without further motion. Reg. Lib. 1684, A, fol. 210. No further proceedings appear.

See, in support of the Lord Keeper's inclination, Bennet v. Box (1663), 1 Ch. Ca. 12; King v. Sands (1669), Freem. C. C. 129; Prat v. Colt (1670), 1 Ch. Ca. 128; Trevor v. Perryor (1670), 1 Ch. Ca. 148 (*semble*); Atty. Gen. v. Sands (1670), Nels. 130, 134 (*semble*). But see *contra*, Goffe v. Whalley (1684), 1 Vern. 282.

But it has long been ~~[illegible]~~ agreed that Lord Nottingham was right upon both points, namely, that equitable interests are subject to equitable execution, and that a creditor may by his diligence obtain priority in equity as freely as at law. The correct principle was stated by Mr. Justice Matthews in Freedman's Co. *v.* Earle, 110 U. S. 710, 712 *et seq.*

"At common law executions upon judgments could not be levied upon estates merely equitable, because courts of law did not recognize any such titles and could not deal with them. They could not be levied upon the estate of the trustee when the judgment was against the *cestui que trust* for the same reason; and when the judgment was against the trustee, if his legal estate should be levied on, the execution creditor could acquire no beneficial interest, and if the levy tended injuriously to affect the interest of the *cestui que trust*, the latter would be entitled to relief, by injunction or otherwise, in equity. Lewin on Trusts, 181, 186; 2 Spence Eq. Jur. 39.

"But as courts of equity regarded the *cestui que trust* as the true and beneficial owner of the estate, to whose uses, according to the terms of the trust, the legal title was made subservient, so in its eyes, the estate of the *cestui que trust* came to be invested with the same incidents and qualities which in a court of law belonged to a legal estate, so far as consistent with the preservation and administration of the trust. This was by virtue of a principle of analogy, adopted because courts of equity were unwilling to interfere with the strict course of the law, except so far as was necessary to execute the just intentions of parties, and to prevent the forms of the law from being made the means and instruments of wrong, injustice, and oppression.

"Thus equitable estates were held to be assignable and could be conveyed or devised; were subject to the rules of descent applicable to legal estates; to the tenancy by curtesy, though not to dower, by an anomalous exception afterwards corrected by statute, 3 and 4 Will. IV., c. 105; and were ordinarily governed by the rules of law which measure the duration of the enjoyment or regulate the devolution or transmission of estates; so that, in general, whatever would be the rule of law, if it were a legal estate, was applied by the court of chancery by analogy to a trust estate. 1 Spence Eq. Jur. 502. . . . The ground of the jurisdiction therefore is, not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution. And this it effects by a sale of the debtor's interest subject to prior encumbrances, or according to circumstances, of the whole estate, for distribution of the proceeds of sale among all the encumbrancers according to the order in which they may be entitled to participate. *Sharp* v. *Earl of Scarborough*, 4 Ves. 538.

"It is to be noted, therefore, that the proceeding is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose, dates from the filing of the bill. As his lien begins with the filing of the bill, it is subject to all existing encumbrances, but is superior to all of subsequent date.

"This is in strict accordance with the analogy of the law, as it was recognized that the judgment creditor who first extends the land by *elegit* is thereby entitled to be first satisfied out of it. It is the execution first begun to be executed, unless otherwise regulated by statute, which is entitled to priority. *Rockhill* v. *Hanna*, 15 How. 189, 195; *Payne* v. *Drew*, 4 East, 523. The filing of the bill, in cases of equitable execution, is the beginning of executing it. The doctrine of equitable assets, to which we are referred by the appellant as the ground of his claim, has no application to the case. Ordinarily and strictly, the term, *equitable assets*, applies only to property and funds belonging to the estate of a decedent, which by law are not subject to the payment of debts, in the course of administration by the personal representatives, but which the testator has voluntarily charged with the payment of debts generally, or which, being non-existent at law, have been created in equity, under circumstances which fasten upon them such a trust. Adams on Equity, 254." — ED.

STATUTE 29 CHARLES II., CHAPTER 3, SECTIONS 10 and 11, 1676.

[8 *Statutes at Large*, 407.]

§ 10. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June it shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seised of in trust for him at the time of the said execution sued; (2) which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; (3) and if any *cestui que trust* hereafter shall die, leaving a trust in fee-simple to descend to his heir, there and in every such case such trust shall be deemed and taken, and is hereby declared to be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended, any law, custom, or usage to the contrary in any wise notwithstanding.

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[1] This section of the Statute of Frauds applies only to bare trusts. Firth *v.* Norfolk, 4 Mad. 503; Doe *v.* Greenhill, 4 B. & Al. 684; Harris *v.* Booker, 4 Bing. 96; Harris *v.* Pugh, 4 Bing. 335; Pettit *v.* Johnson, 15 Ark. 55; Pope *v.* Boyd, 22 Ark. 535, 538; Pitts *v.* Bullard, 3 Ga. 5; Modisett *v.* Johnson, 2 Blackf. 431; State Bank *v.* Macy, 4 Ind. 362; Hanna *v.* Aebker, 84 Ind. 411, 415; Broadwell *v.* Yantis, 10 Mo. 398; McIlvaine *v.* Smith, 42 Mo. 45; Bogert *v.* Perry, 17 Johns. 351; 1 Johns. Ch. 52, S. C.; Jackson *v.* Bateman, 2 Wend. 573, 575 (*semble*); Lynch *v.* Utica Co., 18 Wend. 236; Ontario Bank *v.* Root, 3 Paige, 478; Kellogg *v.* Wood, 4 Paige, 578, 619; Bogert *v.* Power, 10 Paige, 562; Brown *v.* Graves, 4 Hawks, 342; Mordecai *v.* Parker, 3 Dev. 425; Battle *v.* Petway, 5 Ired. 576; Thompson *v.* Ford, 7 Ired. 418; Tally *v.* Reed, 72 N. C. 336; Davis *v.* Inscoe, 84 N. C. 403; White *v.* Kavanagh, 8 Rich. 377; Bristow *v.* McCall, 16 S. C. 548; Shute *v.* Harden, 1 Yerg. 1; Smitheal *v.* Gray, 1 Humph. 491; Coutts *v.* Walker, 2 Leigh, 268.

See also Shaw *v.* Lindsey, 60 Ala. 344; Smith *v.* Cockrell, 66 Ala. 64; McMullen *v.* Lant, 4 Houst. 648; Blanchard *v.* Taylor, 7 B. Mon. 645; Anderson *v.* Briscoe, 12 Bush, 344.

The equitable interest must be in the debtor at the time of the execution. Hunt *v.* Coles, Com. 226; Harris *v.* Pugh, 4 Bing. 335.

The equitable interest of a crown debtor may be reached by an extent. Chirton's Case, Dyer, 160 *a*; cases cited in Godb. 294. 298, 299; King *v.* Smith, Sugd. V. & P. (10th ed.) Append. No. 18; King *v.* De la Motte, Forr. 162; King *v.* Lambe, McClel. 402. This privilege is derived not from a statute, but from the practice of the exchequer at common law. Att'y-Gen. *v.* Sands, Hard. 495.

In some jurisdictions the statutes have gone much further than the Statute of Frauds in making equitable interests subject to a common-law execution. Kennedy *v.* Nunan, 52 Cal. 331; Le Roy *v.* Dunkerly, 54 Cal. 452; Davenport *v.* Lacon, 17 Conn. 278; Johnson *v.* Conn. Bank, 21 Conn. 148, 159; Crosby *v.* Elkade Lodge, 16 Iowa, 399; Kiser *v.* Sawyer, 4 Kas. 503; Miller *v.* Allison, 8 Gill & J. 35; McMechen *v.* Marman, 8 Gill & J. 57; Carpenter *v.* Bower, 42 Miss. 28; Block *v.* Morrison, 112 Mo. 343; Drake *v.* Brown, 68 Pa. 223. — ED.

THE CREDITORS OF SIR CHARLES COX.

In Chancery, before Sir Joseph Jekyll, M. R., Michaelmas Term, 1734.

[*Reported in* 3 *Peere Williams*, 341.]

Another part of this case was reserved for the further consideration of the court, and was as follows: —

Sir Charles Cox, possessed of a term for years, made a mortgage thereof, and died possessed of the equity of redemption of the said mortgage, and leaving greater debts due from him at his death than his estate would extend to pay. Whereupon the question was, whether this mere equity of redemption was only equitable assets, and distributable equally *pro ratâ*, among all the creditors, without regard to the degree or quality of their debts; or whether it should be applied in a course of administration; in which last case the bond creditors would swallow up all the assets, without leaving anything for the simple contract creditors.

And his Honor, after time taken to consider of it, delivered his opinion with solemnity; [1] that this equity of redemption was equitable assets only, the mortgage being forfeited at law, and the whole estate thereby vested in the mortgagee. Wherefore this right of redemption being barely an equitable interest, it was reasonable to construe its equitable assets, and consequently distributable amongst all the creditors *pro ratâ*, without having respect to the degree or quality of their debts; all debts being in a conscientious regard equal and equality the hightest equity; accordingly it was so decreed. But,

Secondly, The court declared, that where a bond is due to A. but taken in the name of B. in trust for A. and A. dies; this must be paid in a course of administration; [2] for in such case there can hardly be any dispute touching the *quantum* of the debt, seeing the principal, interest and also the costs, must be paid to the obligee in the bond; whereas in the other case, the costs must be paid by the party coming to redeem. For the same reason, if a term for years be taken in the name of B. in trust for A., this, on the death of A. the *cestui que trust*, will be legal assets; for here the right to the thing is plain, and if the trustee contests it, he must, *primâ facie*, do it on the peril of paying costs. [3]

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[1] The opinion of the court is materially abridged. — Ed.

[2] Willson *v.* Fielding (1718), 2 Vern. 763 *Accord.* — Ed.

[3] The distinction taken in the principal case between a trust and an equity of redemption was followed in Hartwell *v.* Chitters, Amb. 308, and was approved extrajudicially by Lord Hardwicke in Plunket *v.* Penson, 2 Atk. 290, 294, and by Bayley, J., in Clay *v.* Willis, 1 B. & C. 364, 372. But it is now generally agreed that Sir Joseph Jekyll and Lord Hardwicke were wrong, and that all equitable interests which come to an heir or executor as such are to be distributed like legal interests, upon the principle that equity follows the law. Sharpe *v.* Scarborough, 4 Ves. 538; Cooke *v.* Greg-

KIRKBY *v.* DILLON.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C., FEBRUARY, 1824.

[*Reported in Cooper*, 504.]

SIR JOHN LEACH. Formerly it was very common for debtors to convert their legal estates into equitable estates for the purpose of defeating such of their creditors as might obtain judgments. That practice gave rise to numerous bills in this court for what is called an equitable execution. In many cases of that kind the legislature has now given to creditors full relief in the courts of common law by the Statute of Frauds, which directs the sheriff to deliver execution of all lands, which any person is seised or possessed of, in trust for him against whom the execution is sued. Yet, however liberal the construction which the courts of common law may be disposed to put upon this enactment, it is obvious there must be cases in which a debtor has a beneficial interest in land, and yet no one can be said in a legal sense — in such sense as a court of common law must understand the statute — to be seised or possessed in trust for him. At all events, there must be cases in which no process of a common-law court can get at that estate, of which some one is seised or possessed in trust for the debtor. In such cases as these, presenting impediments, which the common-law courts cannot remove, bills for equitable execution must continue to be filed.[1]

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son, 3 Drew. 547, 549–51; Shee *v.* French, 3 Drew. 716; Mutlow *v.* Mutlow, 4 De G. & J. 539; Lewin, Trusts (9th ed.), 941; 4 Gray, Cas. on Prop. 642, 774, n.

Equitable assets in the sense of assets distributable equally among all the creditors of a deceased person could be created only in the case of realty, and then too only by a devise in trust for, or charged with the payment of the debts of the testator. It was, indeed, the opinion of many judges that a devise of land for the payment of debts would not be equitable assets in the sense just mentioned if the devise were to the heir or executor of the testator. Swinerton *v.* , Y. B. 2 H. IV. 21, 22, pl. 2, per Markham, J., Rickill, J., *diss.;* Anon. Y. B. 3 Hen. VI. pl. 4; Alexander *v.* Gresham 1 Leon. 224; Anon. 1 Roll. Ab. 920, pl. 6; Burwell *v.* Corrant, Hard. 405; Dettick *v.* Caravan, 1 Lev. 224; Girling *v.* Lee, 1 Vern. 63; Hawkes *v.* Buckland, 2 Vern. 106; Cutterback *v.* Smith, Prec. Ch. 127, 2 Vern. 295, s. c.; Bickham *v.* Freeman, Prec. Ch. 136; Masham *v.* Harding, Bunb. 339; Blatch *v.* Wilder, 1 Atk. 420; Fremoult *v.* Dedire, 1 P. Wms. 429; Plunket *v.* Penson, 2 Atk. 290; Allam *v.* Heber, 2 Stra. 1270.

But these cases were finally overruled, and the doctrine established that land devised to any one for the payment of debts must be applied ratably among all creditors. Silk *v.* Prime, 1 Bro. C. C. 138, n. (4); Newton *v.* Bennet, 1 Bro. C. C. 135; Hargrave *v.* Tindal, 1 Bro. C. C. 136 n.; Bailey *v.* Ekins, 7 Ves. 319; Shipherd *v.* Lutwidge, 8 Ves. 26; Helm *v.* Darby, 3 Dana, 185; Clondas *v.* Adams, 4 Dana, 603; Clay *v.* Hart, 7 Dana, 1; Speed *v.* Nelson, 8 B. Mon. 499 (overruling Moore *v.* Waller, 1 J. J. Marsh 491); Benson *v.* Le Roy, 4 Johns. Ch. 651. — ED.

[1] Barthrop *v.* West, 2 Ch. Rep. 62; Angell *v.* Draper, 1 Vern. 399; Anon. 1. P. Wms. 445 (cited); Smithier *v.* Lewis, 1 Vern. 398; King *v.* Marisall, 3 Atk. 192; Shirley *v.* Watts, 3 Atk. 200; Burdon *v.* Kennedy, 3 Atk. 739; Dillon *v.* Plaskett, 2 Bligh, N. S. 239; Smith *v.* Hurst, 1 Coll. 705; Neate *v.* Marlborough, 3 My. & Cr.

407; Bennett *v.* Powell, 3 Drew. 326; Gore *v.* Bowser, 3 Sm. & G. 1; Partridge *v.* Foster, 34 Beav. 1; Horsley *v.* Cox, W. N. (1869), 22; Tillett *v.* Pearson, 43 L. J. Ch. 93; Anglo-Italian Bank *v.* Davies, 9 Ch. D. 275; *Re* Sheppard, 43 Ch. Div. 131; Simpson *v.* Taylor, 7 Ir. Eq. R. 182 *Accord.*

In this country the equitable interests of a debtor are in most States applicable to the satisfaction of his debts, but the mode by which a creditor should proceed is largely regulated by statutes. As a rule, the creditor must exhaust his remedy at law before resorting to a bill for equitable execution. But in some States a creditor may proceed in equity or at law at his option. Crompton *v.* Anthony, 12 All. 33; Barry *v.* Abbot, 100 Mass. 396; Wilson *v.* Martin-Wilson Co., 151 Mass. 515, 517.

In some jurisdictions, e. g. California, Illinois, Indiana, Kansas, Michigan, Minnesota, New Jersey, New York, North and South Dakota, Oklahoma, Tennessee, the legislation has been in the direction of exempting equitable interests of a debtor from the claims of his creditors, especially when the equitable interest came to the debtor from a third person. A full citation of these statutes and the decisions thereunder may be found in Gray, Restraints on Alienation (2d ed.), §§ 280–296. — Ed.

SECTION VII. (*continued*).

(*b*) CREDITORS OF THE CESTUI QUE TRUST.

SCOTT *v.* SCHOLEY AND ANOTHER.

IN THE KING'S BENCH, JUNE 6, 1807.

[*Reported in* 8 *East*, 467.]

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LORD ELLENBOROUGH, C. J., said that the case involved a question of great magnitude and extent, upon which it was proper for the court to deliberate before they pronounced their judgment. The case, therefore, stood over till this day, when his Lordship delivered the opinion of the court.

This was an action on the case against the defendants, as sheriff of Middlesex, for a false return of *nulla bona* to a writ of *fieri facias* against the goods and chattels of George Coleman, Esq., which was tried before me, and in which a verdict was given for the plaintiff. Upon a motion for a new trial, it was ordered that the facts should be stated in the form of a case for the opinion of the court. [After stating the material facts of the case his Lordship proceeded.]

The question of law arising out of these facts is, whether the residuary beneficial interest of Mr. Coleman, under the trusts upon which a lease for years in the new theatre in the Haymarket, and the apparatus, &c., belonging to the same had been assigned, and which remains to him, after satisfying the several debts and incumbrances thereupon, and indemnifying the trustees acting under the trust deed, were liable to be taken in execution by a writ of *fieri facias* for the debt of the plaintiff, a judgment creditor. Which question, in other and fewer words, amounts to this; viz., whether an equitable interest in a term of years can be sold under a *fieri facias*. 1 Pt The sheriff's authority is derived under a writ, by which he is commanded to cause to be made of the goods and chattels of the defendant the sum recovered; and which sum is, of course, to be made by a sale of the things taken under the execution. If the sheriff should not be able, before his writ is returnable, effectually to execute it in this particular, he is allowed to excuse himself by returning that the goods remain in his hands, unsold, for want of buyers; upon which another writ issues, commanding him to expose to sale the goods so remaining in his hands unsold. The language of these writs and return evidently imports that the goods and chattels, which are the object of them, are, properly, of a tangible nature, capable of manual seizure, and of being detained in the sheriff's hands and custody, and such, also, as are conveniently capable of sale and transfer by the sheriff, to whom the writ is directed, for the satisfaction of a creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold property itself is capable, and also in respect of the instrument by which the term is created and secured (both of which are capable of delivery to a vendee), has been always held to answer the description of the writ, and to be salable thereunder. Dyer, 363 *a.* But no single instance is to be found in the history and practice of the courts of common law in which an equitable interest in a term of years has ever been recognized as salable (seizable, of course, it cannot be) under a *fieri facias.* Besides, what locality belongs to an equitable interest, a resulting trust, for instance, in a term for years, so as to render it more fitly the subject of execution and sale by the sheriff of any one county than another? The degree of inconvenience which would attend the sale of such interests by the sheriff, although it would, in strictness, afford no argument against an ascertained legal power of the sheriff on such a subject, is a sufficient reason why the court should anxiously watch the extension of such power in a case in any respect doubtful. What means, in any degree adequate, has the sheriff of taking an account of the actual amount of the incumbrances thereupon, or of ascertaining the extent of the indemnities which the trustees may be entitled to claim? The sale of such an interest, if it were to be made at all by the sheriff, must, necessarily, be made under circumstances of still greater ignorance and uncertainty as to its value than attend sales of any other description of property; and not only without any legal means of delivering a present possession of the thing sold, but, in general, without having even the type or instrument of any legal interest whatsoever, present or future, in the subject of such sale, to exhibit to the sight or deliver to the hands of a purchaser. It has, indeed, been urged in argument, as an inconvenience on the other side, if such equities of redemption in chattel interests shall be held not to be salable under an execution; that, by means of a mortgage of the largest leasehold property for the smallest sum imaginable, such property might be effectually protected and withdrawn from the legal claims of every creditor. But the inconvenience in the case put does not extend beyond the necessity which such a step would occasion, of resorting to a different remedy, to be applied in another court, upon a bill to be filed by the judgment creditor in such other court for the purpose of obtaining it. In a court of equity he might be let in to redeem such mortgage incumbrances as stood in the way of his common-law remedy by execution; or he might have a decree for the sale of the mortgage term itself, in satisfaction of his rights as an execution creditor. Shirley *v.* Watts[1] is an authority for this purpose; as is also the case of Burdon *v.* Kennedy.[2] In the case of Lyster *v.* Dolland,[3] Lord Thurlow was, at last, of opinion that an equity of redemption of a term could not be taken in execution; though, at first, under an apprehension that the language of the tenth section of the Statute of Frauds applied to such a case, he had inclined to hold otherwise. But the very silence of that statute, which, while it expressly introduces a new provision in respect to lands and tenements held in trust for the person against whom an execution is sued, says nothing as to trusts of chattel interests, affords a strong argument that those interests were meant to continue in the same situation and plight in respect of executions in which both freehold and leasehold trust interests equally stood prior to the passing of that statute. In the absence, therefore, of any authority in favor of the sale of such an equitable interest under a common-law execution against goods, we are of opinion, upon the grounds already stated, that the sheriff's return of *nulla bona* in this case, where the defendant in the execution had no other property besides the trust property in question, was not a false return; and, of course, that the verdict, which has been obtained by the plaintiff against the sheriff in this case, must be set aside, and a new trial granted.[1]

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[1] 3 Atk. 200.

[2] 3 Atk. 739.

[3] Reported in 3 Bro. C. C. 480, and 1 Ves. Jr. 431.

DUNDAS *v.* DUTENS.

IN CHANCERY, BEFORE LORD THURLOW, C., JULY 1, 1790.

[*Cited from a note by Lord Manners in 2 Ball & Beatty*, 233.[2]]

IN the case of Dundas *v.* Dutens, the question was, whether stock that had been settled could be brought within the reach of creditors. I have a note of that case, which on this point is more full than the printed report of it, which I will briefly state. Lord Thurlow says: "Is there any case where stock standing in a trustee's name can be made available to pay debts, or that debts (and stock is a *chose in action*) shall be transferred to creditors for that purpose? You cannot have an execution at law against such effects. The opinion in Horn *v.* Horn[3] is so anomalous and unfounded, that forty such opinions

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[1] Lyster *v.* Dolland, 1 Ves. Jr. 431; Metcalf *v.* Scholey, 2 B. & P. N. R. 461; Caillaud *v.* Estwick, 2 Anst. 381; Scarlett *v.* Hanson, 12 Q. B. D. 213; Smith *v.* McCann, 24 How. 398; Freedman's Co. *v.* Earle, 110 U. S. 710; Piatt *v.* Oliver, 2 McL. 267, 297–98; Colvard *v.* Coxe, Dudley (Ga.), 99; Russell *v.* Lewis, 2 Pick. 508; Van Norman *v.* Circuit Judge, 45 Mich. 204; Gypsum Co. *v.* Circuit Judge, 97 Mich. 631; Disborough *v.* Outcalt, Saxton, 298; Hogan *v.* Jaques, 19 N. J. Eq. 123; Wilkes *v.* Ferris, 5 Johns. 335; Hendricks *v.* Robinson, 2 Johns. Ch. 283, 312; Lynch *v.* Utica Co., 18 Wend. 236; Wright *v.* Douglass, 3 Barb. 554; Rice *v.* Burnett, Speers, Eq. 579, 585; Brown *v.* Wood, 6 Rich. Eq. 155, 167 *Accord.*

Cook *v.* Kennedy, 12 Ala. 42; Prichard *v.* Brown, 4 N. H. 397; Hutchins *v.* Heywood, 50 N. H. 491, *contra.* — ED.

[2] Ves. Jr. 196; 2 Cox, 240, s. c. — ED.

[3] Amb. 79.

would not satisfy me. It would be preposterous and absurd to set aside an agreement, which, if set aside, leaves the stock in the name of a person where you could not touch it."[1]

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[1] Caillaud *v.* Estwick, 2 Anst. 384; Nantes *v* Corrock, 9 Ves. 182, 189 (*semble*); Rider *v.* Kidder, 10 Ves. 368; Plaskett *v.* Dillon, 1 Hog. 328 *Accord.*

Horn *v.* Horn, Amb. 79; Taylor *v.* Jones, 2 Atk. 600 (*semble*); Hadden *v.* Spader, 20 Johns. 554; 5 Johns. Ch. 280; Storm *v.* Waddell, 2 Sandf. Ch. 494 (but see Donovan *v.* Finn, 1 Hopk. 59; Bramhall *v.* Ferris, 14 N. Y. 41, 45; Graff *v.* Bonnett, 31 N. Y. 9, 26; Campbell *v.* Foster, 35 N. Y. 361, 365), *contra.* — Ed.

// The explanation of the principal case ~~lies~~ in the fact that ~~by the English~~ decisions the legal interest in a *chose in action*, owned by a debtor, could not be reached by his creditor, either at law or in equity. Bank of England *v.* Lunn, 15 Ves. 577 (*semble*); Guy *v.* Peakes, 18 Ves. 197 (*semble*); Francis *v.* Wigzell, 1 Mad. 264 (*semble*); Grogan *v.* Cooke, 2 B. & B. 230 (*semble*); Cochrane *v.* Chambers, Amb. 79 N. 1; Sims *v.* Thomas, 12 A. & E. 536. The English rule on this point was adopted by many American Courts. Shaw *v.* Aveline, 5 Ind. 380; Stewart *v.* English, 6 Ind. 176; Peoples *v.* Stanley, 6 Ind. 410; Williams *v.* Reynolds, 7 Ind. 622; Keightley *v.* Wallis, 27 Ind. 384; Buford *v.* Buford, 1 Bibb, 305; Weribrinner *v.* Weisiger, 3 Mon. 32; McFerran *v.* Jones, 2 Litt. 219; Corby *v.* Ross, 3 J. J. Marsh. 290; Estill *v.* Rodes, 1 B. Mon. 314; Hardenburg *v.* Blair, 30 N. J. Eq. 645, 663; Green *v.* Keen, 14 R. I. 388; Moxon *v.* Gray, 14 R. I. 641; Ewing *v.* Cantrell, Meigs, 364; Erwin *v.* Oldham, 6 Yerg. 185; White Co. *v.* Atkeson, 75 Tex. 330 (*semble*).

// But in other States the debtor's interest in a *chose in action* is accessible to a creditor by a bill for equitable execution. Watkins *v.* Dorsett, 1 Bland, 530; Sargent *v.* Salmond, 27 Me. 539; Drake *v.* Rice, 130 Mass. 410; Wright *v.* Petrie, Sm. & M. 282, 320; Catchings *v.* Manlove, 39 Miss. 655: Tappan *v.* Evans, 11 N. H. 311, 326; Abbot *v.* Tenney, 18 N. H. 109; Chase *v.* Searles, 45 N. H. 511; Bayard *v.* Hoffman, 4 Johns. Ch. 450; Weed *v.* Pierce, 9 Cow. 722; Prosens *v.* McIntire, 5 Barb. 424, 433–34; Mc Gill *v.* Harman, 2 Jones, Eq. 179; Burton *v.* Farinholt, 86 N. C. 280. (But see Doak *v.* State Bank, 6 Ired. 309, 335.)

// If, however, legal property is exempt from execution at law on grounds of public policy, it is of course equally beyond the reach of equitable execution. McCarthy *v.* Goold, 1 B. & B. 389 (officer's half-pay); Matthews *v.* Feavor, 1 Cox, 278 (copyhold). — Ed.

CHAPTER IV.

EXTINGUISHMENT OF A TRUST.

GOODRIGHT, LESSEE OF ALSTON, *v.* WELLS AND OTHERS.

IN THE KING'S BENCH, JUNE 30, 1789.

[*Reported in* 2 *Douglas*, 771.]

THIS ejectment was tried before Lord Mansfield, in Middlesex, at the sittings after last Easter Term, and a verdict found for the plaintiff, subject to the opinion of the court, on a case, which, as far as is material to be stated, was as follows:

If cqt gts n eql ttl, lst satnd.

James Selby, serjeant-at-law, agreed for the purchase of the estate in question, and paid for it, but died before any conveyance was made of it to him, having by his will [made subsequent to the agreement], devised — "All the rest of my real and personal estate whatsoever, and wheresoever, to my said wife in trust, that she do thereout educate and maintain my said son, until he shall attain the age of twenty-one years, and until he shall have sufficiently settled and secured to, and upon, my said wife, what is to be settled upon, and given to, her as aforesaid, and, afterwards, in trust, to convey and dispose of all the then rest of my real and personal estate, and the produce thereof, to my said son, his heirs, executors, and assigns; but, in case my said son shall die without issue before he shall attain his said age of twenty-one years, then in trust, etc." — After the testator's death, a conveyance by lease and release, of the estate in question, was made to Mrs. Selby the widow, who died before the son attained his age of twenty-one years, which he afterwards did attain, and died in 1772, having been always in possession of the estate after the death of his mother, and having devised it to charitable uses, which devise was void by the statute of mortmain.[1] The lessor of the plaintiff was his heir-at-law on the part of the mother, and the defendants his heirs-at-law on the part of the father's mother.

The case was argued on Friday, the 29th of June, by *Wilson*, for the plaintiff, and *Batt*, for the defendants.[2]

The court took till this day to consider, when they delivered their opinions, to the following effect: —

LORD MANSFIELD (after stating the case), — Serjeant Selby, after his purchase, was owner of the equitable estate, and had a right to go

[1] 9 Geo. 2, c. 36.

[2] The arguments of counsel are omitted.

into Chancery to compel a conveyance. After his death, the vendor conveyed to the widow, which conveyance, on the condition of the son's living till twenty-one, and making a certain provision for her, was to be absolutely in trust for him. He outlived his mother, and on her death, the trust estate was completely vested in him (the subsequent limitations in the will being on contingencies which never happened), and the legal estate descended to him from her. The question is, To whom the whole estate descended on the death of the son? for it did descend, the devise to charitable uses being void. If it descended from the mother, the lessor of the plaintiff takes as heir-at-law. But, it was contended, that, though he is heir, there is a trust for the paternal heirs; and it was said to be settled, that the court will not suffer a trustee to recover in ejectment, against the *cestui que trust*. When this was mentioned on the trial, I said, as I did the other day in the case of Doe *v.* Putt[1] that this rule is subject to the qualification, of its being clearly the case only of a mere trust, for then, by taking notice of it, the court prevents delay and expense; but it will not decide when there is a doubt, but leave the question to a jurisdiction which regularly takes cognizance of matters of trust. The counsel said, there might, perhaps, be cases on the subject, and the parties wished to have the opinion of the court. Now, who is to be considered as heir-at-law on this ejectment? It would be sufficient for the judgment which I shall deliver to say, that it is not a clear case that the lessor of the plaintiff is a mere trustee, for, that point being doubtful, he is entitled to recover at law, as he certainly has the legal right. But I will go farther, and throw out some observations, to show, that it is not only doubtful, but that the inclination of my opinion is, that you cannot support such a trust. A case so circumstanced, in every particular, probably never existed before, and perhaps, never may happen again. But, cases must often have happened on which the general question would arise; viz. Pl Whether, when *cestui que trust* takes in the legal estate, possesses under it, and dies, the legal and equitable estate shall open on his death, and be severed for the different heirs? Consider it, first, upon authority; and, secondly, upon principle. 1. No case has ever existed where it has been so held; none where the heir-at-law of one denomination has, on the death of the ancestor, been considered as a trustee for the heir-at-law of another denomination, who would have taken the equitable estate, if that and the legal estate had not united. 2. On principle, it seems to me impossible; Pl for the moment both meet in the same person, there is an end of the trust. He has the legal interest, and all the profits, by his best title. A man cannot be a trustee for himself. Why should the estates open upon his death? What equity has one set of heirs, more than the other? He may dispose of the whole as he pleases and, if he does not, there is no room for Chancery to interpose, and the rule of law must prevail. The case in the Common Pleas is an authority, if it went on this ground, and I am told it did. There, the *cestui que trust* taking the legal estate as a purchaser, the descent was altered. *Quâcunque viâ datâ*, therefore, the lessor of the plaintiff is entitled. If the question is doubtful, then, in this court, the legal right must prevail; and, if the weight of opinion and argument is, that the legal estate must draw the trust after it, the case is still stronger against the defendants.

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[1] 2 Doug. 721, 722.

Willes, J. I entirely agreed with my Lord as to the legal estate, but my doubt is, what is become of the equitable use. Let us see how the facts stand. The money was paid by the father, but he died before any conveyance, devising as stated in the case. Now, what was the ancient use? It was to the heirs *ex parte paternâ*. I do not agree, that there is no difference as to the different heirs. When the question is between those of the paternal and those of the maternal line, the law always gives the preference to the former. After the father's death, a conveyance was made to the widow and her heirs, in trust. So, the estate in her was not absolute, but charged with the trust. Suppose the son, in his lifetime, had called in the legal estate, and become a purchaser, there is not a doubt, but, in that case, the paternal heirs would have succeeded. There having been no such conveyance to him, the legal estate descended to him from the mother. But I think he took it clothed with the trust, and subject to the ancient use. I do not say he was a trustee for himself, but this ancient use remained uncontrolled, and revived, as between the different heirs, on his death, no act having been done to alter it. If, therefore, the question were to come before me in another court, I should decree a trust in the lessor of the plaintiff. But he certainly is entitled to the legal estate, and that is enough here.

Ashhurst, J. We all agree, that, if there is a doubt as to the trust, the lessor of the plaintiff is entitled to the estate in this court, and, therefore it is not necessary to give any opinion on the other point. But, as it has been moved, I will mention, that I am inclined to be of opinion, that the trust, as well as the legal estate, shall go to the heirs *ex parte paternâ*. To support the contrary position, it must be said, that the son took as trustee for himself and his paternal heirs, for I do not see how the estate shall open for the heirs, if he was not himself a trustee. I never knew any case where the court held, when an estate came by descent, that the heir was a trustee although the ancestor was not. The case in the Common Pleas[1] goes a great way to determine this question; for it shews, that, where the trust and legal estates join, they shall both go according to the legal estate.

Buller, J. I am entirely of the same opinion with my Lord, and my brother Ashhurst, on both points. On the first, we are all agreed. As to the second, it is observable, that no case has been cited, nor do I believe any ever existed, where, in a court of equity, an heir of one sort has been determined to hold as trustee for an heir of the other sort. In a court of law, try the question by the principle stated by Mr. *Batt*, viz. that, where two titles unite, the party shall be in of the best. What is the better title here? The clear fee-simple estate which descended from the mother. I think there is a mistake in taking the heirs on either side into consideration. They had no interest during the life of the ancestor; the whole was in him. The only person to be considered is the ancestor, who was seised in fee both of the legal and equitable estate. A case has been put, which does not in my opinion vary the question, viz. the case of the son's having called for a conveyance. However, as the mother died before he came of age, and she was not directed to convey till then, that case does not apply. We are to take the facts as they stand. To be sure, if he had taken the legal estate by purchase, the paternal heirs would have been entitled, but, as he took it by descent from his mother (and the case would have been the same if we suppose her to have lived beyond his age of twenty-one, and that he never called for a conveyance), I think the trust was merged and gone.

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[1] Doe *v.* Putt, 2 Doug, 773.

The Postea to be delivered to the plaintiff.[1]

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[1] Doe *v.* Putt, Doug. 773 (*cited*); Wade *v.* Paget, 1 Bro. C. C. 363, 1 Cox, 74 s. c.; Selby *v.* Alston, 3 Ves. 339; Langley *v.* Sneyd, 1 S. & S. 45; Wood *v.* Douglas, 28 Ch. D. 327; Creagh *v.* Blood, 3 Jon. & Lat. 133; Conolly *v.* Conolly, 1 Ir. R. Eq. 376; Hopkinson *v.* Dumas, 42 N. H. 296; Cooper *v.* Cooper, 1 Halst. Ch. 9; Wills *v.* Cooper, 1 Dutch. 137; Whyte *v.* Arthur, 17 N. J. Eq. 521; Nicholson *v.* Halsey, 1 John. Ch. 417; Gardner *v.* Astor, 3 Johns. Ch. 53; Greene *v.* Greene, 125 N.Y. 506, 510; Peacock *v.* Stott, 101 N. Ca. 149; Shepard *v.* Taylor, 15 R. I. 204 *Accord.*

A trust may be terminated by a surrender of the legal title by the trustee to the *cestui que trust*, as in Miller *v.* Simonton, 5 S. Ca. 20; or by a conveyance by the trustee and *cestui que trust* to a third person, as in Parker *v.* Converse, 5 Gray, 336; or by a release by the *cestui que trust* to the trustee, as in Newman *v.* Newman, *supra*, 335; Owings *v.* Owings, 3 Ind. 142; Ormsby *v.* Dumesnil, 91 Ky. 601; or, in the absence of a statute to the contrary, by the escheat of the legal title of land held in trust, as in King *v.* Mildmay, *supra*, 348.

A trust, revocable by the terms of its creation, may of course be extinguished by the exercise of the power of revocation. Yard *v.* Pittsburgh, 131 Pa. 205. — Ed.

CHAPTER V.

THE DUTIES OF A TRUSTEE.

SECTION I.

To convey the Trust-res as the Cestui que Trust directs.

SAUNDERS *v.* NEVIL.

IN CHANCERY, BEFORE SIR JOHN TREVOR, M. R., JANUARY 24, 1701.

[*Reported in* 2 *Vernon* (*Raithby's Edition*), 428.]

A TRUST being limited to the plaintiff and the heirs of his body,[1] with remainders over; the bill was to have the trustees convey to him in fee.[2]

THE MASTER OF THE ROLLS decreed them to convey an estate tail only, and refused to decree a conveyance in fee; and the case of Mr. Cooke and Woodward was cited, where the Lord Jefferies did refuse to decree a conveyance in fee, the remainder after an estate tail being limited to a charity.[3]

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[1] And in default of heirs of the plaintiff's body, or according to the answer, if he should die without heirs of his body, then remainder over; the rents and profits to be applied in his maintenance till twenty-four, and the surplus, if any, to be paid to him. R. L.

[2] This is not correct; the bill was for a conveyance to plaintiffs and the heirs of his body, he having attained twenty-four, and had two children in marriage, and the defendants insisted that the will being so worded it was the intention of the testatrix that the plaintiff should not have the legal estate, nor be enabled to dock the entail; but that the premises should be preserved for the heirs of the body of the plaintiff, if he should leave any at his death, or in default thereof for the persons in remainder; and the decree was, that the defendants, the trustees, should execute a conveyance of the estate in question to the plaintiff and the heirs of his body. Reg. Lib. 1701, B, fol. 163.

[3] Payne *v.* Barker, Sir O. Bridgman, 24 (*semble*), *Accord.* See also Talbot *v.* Whitfield, Bunb. 204. — ED.

"I can conceive, although it would be a strange and unusual mode of conveyancing, a conveyance or devise to a man and the heirs of his body in trust for A. B., and his heirs; and then the estate tail would be held in trust for A. B., and A. B. could call upon the tenant in tail, I dare say, to bar the estate tail and to enlarge it into a fee for his benefit." Per Lord Cairns, C., in Dawkins *v.* Penrhyn, 4 App. Cas. 51, 60. — ED.

TURNER *v.* BUCK AND ANOTHER.

IN CHANCERY, BEFORE LORD COWPER, C. EASTER TERM, 1715.

[*Reported in* 22 *Viner's Abridgment*, 21, *placitum* 5.]

T. SOLD to C. an estate which he claimed as heir to his father by virtue of a marriage settlement upon the marriage of his father with his mother-in-law, M., being the lands of the same M. — B., as heir under that settlement, brought a bill to discover the title of T. and C., and also to compel the surviving trustee in a former settlement in the family to convey to B. as heir under the settlement.

COWPER, C., declared he would not decree the trustee to convey the legal estate to the *cestui que trust* to compel him to suffer the *cestui que trust* to bring an ejectment in his name against C., because he was a purchaser without notice of this former settlement, and *cestui que trust* was a volunteer; and said it was a constant rule in equity never to aid any person who claims by a voluntary settlement, against a fair purchaser without notice; as in the case of a disseisor [as it now appeared that it was] who conveys away the lands upon a valuable consideration, this court will not compel the trustee to convey the legal estate to *cestui que trust*, to enable him to recover the possession at law against the purchaser, but the trustee may do it himself if he think fit; but this court will not compel him to it. Though *Sir J. Jekyll* and *Mr. Vernon* insisted strongly for it, and said the possession of the trustee was the possession of the *cestui que trust*, and that it was a breach of trust in the trustee not to convey at any time to *cestui que trust* on request. But in this case Lord Cowper decreed that T. should account for the profits of the estate from his entry to the time of the conveyance to C., for he was a disseisor, though T. had two verdicts for him in ejectment; but this old settlement was discovered after those trials.

HEAD *v.* LORD TEYNHAM.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, SIR W. H. ASHHURST, J., AND SIR BEAUMONT HOTHAM, B., COMMISSIONERS, DECEMBER, 1783.

[*Reported in* 1 *Cox*, 57.]

BILL to carry the trusts of a will into execution, whereby, amongst other things, lands were limited to trustees for a term of five hundred years to raise £4,000 for younger children's portions. There being six younger children entitled under this limitation to have the £4,000, two of them assigned their shares of the £4,000 to a trustee for the benefit of two other of the children. And the only question was, whether it was necessary that this trustee should be a party to this suit. For plaintiff it was insisted that as the original trustees of the term who had the legal estate, and all the children who had the beneficial interest, were before the court, there was no occasion to make the other trustee a party, and the court would direct a sale of the term without his joining in the sale; and of that opinion was the court, and decreed accordingly.[1]

GOODSON *v.* ELLISSON.

IN CHANCERY, BEFORE LORD ELDON, C., AUGUST, 1824; MARCH, JULY, DECEMBER, 1826; APRIL 21, 1827.

[*Reported in* 3 *Russell,* 583.]

ELDON (LORD CHANCELLOR).[2] In 1767 a deed was executed, and I will assume that a fine was properly levied in pursuance of it, by which an estate was granted and conveyed to Richard Ellisson and his heirs on certain trusts. The bill deduces the various changes of the title to the equitable interest, which occurred between 1767, and November, 1822, bringing it, in 1819, into eight different persons, each of whom is represented as the owner of an undivided eighth part of the property. These eight persons sell the property in different lots to different persons; and, the present plaintiff having bought one of the lots, a deed is prepared, conveying certain parcels of land to him; that deed the eight persons who are represented as the owners of the beneficial interest have executed; and the co-heiresses of Richard Ellisson are also required to execute it. They refuse, and the bill is filed.

The Master of the Rolls has ordered the defendants to execute the conveyance, and to pay the costs of the suit.

Now, even if the plaintiff had been the purchaser of the whole estate, and the conveyance had related to the whole, it would have been a matter for consideration, whether the trustees would not have a right, where there has been so much devolution of title, to have the title examined in this court, instead of being required to acquiesce in an opinion which was not clothed with the sanction of judicial authority. But this plaintiff is the purchaser of only sixteen acres of the property, and the rest of the estate has been sold to other persons in different lots! Now, I confess it is quite new to me to be informed that you can call on a trustee from time to time to divest himself of different parcels of the trust estate, so as to involve himself as a party to conveyances to twenty different persons. Has not a trustee a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper?" I have been accustomed to think that a trustee has a right to be delivered from his trusts, if the *cestuis que trust* call for a conveyance.

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[1] Compare Wood *v.* Williams, 4 Mad. 156; Cope *v.* Parry, 2 J. & W. 538. — ED.

[2] Only the opinion of Lord Eldon, and that, too, slightly abridged, is given. — ED.

Another principle which has been lost sight of in this decree is, that a trustee can be called on to convey only by the words and descriptions by which the conveyance was made to him. In this respect he is like a mortgagee.

I see nothing in the record which would have hindered me from directing these ladies to convey, if I had such parties before me as would have enabled me to direct a conveyance of the whole estate. If the *cestuis que trust* had all been here, they might have prayed that the sixteen acres in question might be conveyed to Goodson, and the residue of the estate to a trustee on trust to convey to the other purchasers. As the suit is framed, I cannot take that course.

The following decree was made: "His Lordship doth order that the decree made in this cause, the 18th of August, 1824, be reversed; and it is ordered that it be referred to the Master to inquire and state to the court whether the plaintiff is entitled to that beneficial equitable estate which he seeks to have clothed with a legal estate by conveyance; and in making the said inquiry it is ordered that the Master do ascertain and state to the court whether all prior vested and contingent equitable titles have failed by deaths or non-existence of persons who would have taken before the plaintiff, &c. And it is ordered that the said Master do tax the costs of the defendants of this suit to this time, including their costs of the appeal, as between party and party, that the same, when taxed, be paid by the plaintiff to the defendants; but this taxation is to be without prejudice as to whether the defendants shall not be finally entitled to any further costs, charges, and expenses; and his Lordship doth reserve the consideration of all further directions, and whether the defendants shall be allowed any further costs, charges, and expenses up to this time, and also the consideration of all subsequent costs, charges, and expenses, until after the Master shall have made his report."[1]

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[1] In *Re* Radcliffe, '92, 1 Ch. 227; Inches *v.* Hill, 106 Mass. 575; Henderson's Estate, 15 Phila. 598, — one of several *cestuis que trust* obtained a decree for a conveyance of his share of the trust property.

In Rhoads *v.* Rhoads, 43 Ill. 239; Gunn *v.* Brown, 63 Md. 96; Seamans *v.* Gibbs, 132 Mass. 239; Zabriskie *v.* Wetmore, 26 N. J. Eq., 18; Hutchison's Ap. 82 Pa. 509, — a bill filed by one of several *cestuis que trust* for a conveyance of his share was dismissed, not however on the ground taken by Lord Eldon, but out of regard for the intention of the creator of the trust. See also Richardson's Est., 16 Phila. 326; Smith *v.* Snow, 3 Mad. 10; Thompson *v.* Galloupe, 100 Mass. 435.

In Russell *v.* Grinnell, 105 Mass. 425; Cooper *v.* Cooper, 36 N. J. Eq. 121; Moss's Est., 15 Phila. 516, — an equitable tenant for life was not permitted to obtain a conveyance of a legal life estate. — ED.

WATTS *v.* TURNER.

IN CHANCERY, BEFORE SIR JOHN LEACH, M. R., JULY 6, 1830.

[*Reported in* 1 *Russell & Mylne*, 634.]

A TRUST estate descended to the defendant; and the plaintiff, who was *cestui que trust*, being entitled to the legal estate, a draft of the intended conveyance was sent to the solicitor of the defendant, and approved of by him. The defendant afterwards refused to execute the conveyance unless the plaintiff paid him a sum of money. The bill was filed to compel a conveyance.

Mr. Pemberton, and *Mr. Ching*, for the plaintiff.

Mr. Willbraham, for the defendant, the trustee, submitted, that as the plaintiff had chosen to file a bill, instead of applying for a conveyance in a summary way by petition under the statute, he had himself to blame for any trouble and expense he had incurred.

THE MASTER OF THE ROLLS made the decree against the defendant, with costs.[1]

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[1] In Y. B. 38 Hen. VI. 35, pl. 23; Cary, 13; Jones *v.* Lewis, 1 Cox, 199; Willis *v.* Hiscox, 4 M. & Cr. 197; Holford *v.* Phipps, 3 Beav. 434; Thorby *v.* Yeats, 1 Y. & C. C. C. 438; Campbell *v.* Home, 1 Y. & C. C. C. 664; Penfold *v.* Bouch, 4 Hare, 271; Firmin *v.* Pulham, 2 De G. & Sm. 99; Devey *v.* Thornton, 9 Hare, 222, 232; King *v.* King, 1 De G. & J. 663; Palairet *v.* Carew, 32 Beav. 564 (see also *Re* Knox, '95, 1 Ch. 538, under Trustee Act of 1893); Pearce *v.* Byers, 25 Ill. Ap. 51; Warren *v.* Ireland, 29 Me. 62, 68; Paine *v.* Forsaith, 86 Me. 357; Reid *v.* Gordon, 35 Md. 174; Hunnewell *v.* Lane, 11 Met. 163; Smith *v.* Harrington, 4 All. 566; Bowditch *v.* Andrews, 8 All. 339; Slater *v.* Hurlbut, 146 Mass. 308; Whall *v.* Converse, 146 Mass. 345; Sears *v.* Choate, 146 Mass. 395; Felton *v.* Sawyer, 41 N. H. 202; Archer *v.* American Co., 50 N. J. Eq. 33; Battle *v.* Petway, 5 Ired. 576; Turnage *v.* Greene, 2 Jones, Eq. 63; Matthews *v.* McPherson, 65 N. C. 189; Taylor *v.* Huber, 13 Oh. St. 288; Freyvogle *v.* Hughes, 56 Pa. 228; Megargee *v.* Naglee, 64 Pa. 216; Hepburn's App., 65 Pa. 468; Culbertson's App., 76 Pa. 145; Mendenhall's App., 151 Pa. 214; Fisher *v.* Wister, 154 Pa. 65; Clark's Est., 15 Phila. 573; Hubb's Est., 16 Phila. 211; Ives *v.* Harris, 7 R. I. 413; Taylor *v.* Taylor, 9 R. I. 119; Greene *v.* Aborn, 10 R. I. 10 (*supra*); Rogers *v.* Rogers, 10 R. I. 556; Nightingale *v.* Nightingale, 13 R. I. 113; Whelan *v.* Reilly, 3 W. Va. 597, 613, — the right of a *cestui que trust* to compel a conveyance of the legal estate by the trustee was fully recognized.

But see *contra*, Ring *v.* McCoun, 10 N. Y. 268; Lent *v.* Howard, 89 N. Y. 169, 181; Asche *v.* Asche, 113 N. Y. 232; Cuthbert *v.* Chauvet, 136 N. Y. 326; *Re* Lewis's Est., 23 N. Y. Sup. 287.

Compare Farrington *v.* Farmers' Co., 21 N. Y. Sup. 194.

If there are several *cestuis que trust* the trustee will not be compelled to convey unless all concur in demanding the conveyance. Gerard *v.* Buckley, 137 Mass. 475; Twining *v.* Girard Co., 14 Phila. 74; Conrow's App. 3 Pennyp. 356.

There is, of course, nothing to prevent a trustee from voluntarily conveying the legal title to the person or persons having the entire equitable interest. Stone's Case, 138 Mass. 476. But see Lent *v.* Howard, 89 N. Y. 169, 181. — ED.

SAUNDERS *v.* VAUTIER.

IN CHANCERY, BEFORE LORD LANGDALE, M. R., MAY 7, 1841.

[*Reported in* 4 *Beavan,* 115.]

THE testator, Richard Wright, by his will, gave and bequeathed to his executors and trustees thereinafter named all the East India stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue due thereon, until Daniel Wright Vautier should attain his age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, and assigns, absolutely. And the testator devised and bequeathed his residuary real and personal estate to the persons in his will named.

The sum of £2,000 East India stock was standing in the testator's name, at his death, in 1832. A suit was afterwards instituted for the administration of the testator's estate; and Daniel Wright Vautier being an infant, a reference in the cause was made to the Master, to approve of a sum to be allowed for his maintenance. The Master reported his fortune to consist of the East India stock in question, and reported that £100 a year ought to be allowed for his maintenance out of the dividends thereof.

Sir C. C. Pepys, who was then Master of the Rolls, by an order dated the 25th of July, 1835, confirmed the report, and ordered the payment of £100 a year out of the dividends of the East India stock, for the maintenance of the infant, Daniel Wright Vautier.

Daniel Wright Vautier attained twenty-one in March, 1841, and presented a petition to have a transfer of the fund to him.

Mr. Pemberton argued that the petitioner had a vested interest, and that as the accumulation and postponement of payment was for his benefit alone, he might waive it and call for an immediate transfer of the fund. Josselyn *v.* Josselyn.[1]

THE MASTER OF THE ROLLS. I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.

Mr. Kindersley, for the residuary legatees, most of whom are infants, was proceeding to argue that the petitioner did not take a vested interest until he attained twenty-five, but the Master of the Rolls observed that the contrary must have been decided or assumed when the order for maintenance had been made by the present Lord Chancellor. He did not, at present, see any reason to doubt the propriety of that order, but the argument must assume it to be erroneous, and call upon him to decide in a different manner, and he thought that it would be inconvenient to argue again, in this court, a point on which the judge of the court of rehearing had, probably, already expressed an opinion.

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[1] 9 Sim. 63.

The cause stood over, with liberty to apply to the Lord Chancellor, when the Lord Chancellor held the legacy vested, and ordered the transfer.[1]

ADELBERT E. CLAFLIN *v.* WILLIAM CLAFLIN AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH 2, 1889.

[*Reported in* 149 *Massachusetts Reports*, 19.]

FIELD, J.[2] By the eleventh article of his will as modified by a codicil, Wilbur F. Claflin gave all the residue of his personal estate to trustees, "to sell and dispose of the same, and to pay to my wife, Mary A. Claflin, one third part of the proceeds thereof, and to pay to my son Clarence A. Claflin, one third part of the proceeds thereof, and to pay the remaining one third part thereof to my son Adelbert E. Claflin, in the manner following, viz. ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years."

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[1] Cr. & Ph. 240. See to the same effect Josselyn *v.* Josselyn, 9 Sim. 63; Jackson *v.* Marjoribanks, 12 Sim. 93; Curtis *v.* Lukin, 5 Beav. 147, 155, 156 (*semble*); Rocke *v.* Rocke, 9 Beav. 66; Coventry *v.* Coventry, 2 Dr. & Sm. 470; *Re* Jacob's Will, 29 Beav. 402; Tatham *v.* Vernon, 29 Beav. 604, 617; Buttanshaw *v.* Martin, Johns. 89; Gosling *v.* Gosling, Johns. 265; Magrath *v.* Morehead, L. R. 12 Eq. 491; Hilton *v.* Hilton, 14 Eq. 468, 475; Croxton *v.* May, 9 Ch. D. 388 (*semble*); Nixon *v.* Cameron, 26 Ch. Div. 19; *Re* Tweedie, 27 Ch. D. 315; Harbin *v.* Masterman, '94, 2 Ch. 184; *In re* Johnston, '94, 3 Ch. 204; Miller *v.* Miller (Court of Session, 1890), 18 R. 301; Cuthbert (Court of Session, 1894), 7 Jurid. Rev. 181, 31 Sc. L. Rep. 575; Woolley *v.* Preston, 82 Ky. 415; Huber *v.* Donoghue, 49 N. J. Eq. 125; Jasper *v.* Maxwell, 1 Dev. Eq. 357; Henderson's Est., 15 Phila. 598 *Accord.*

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The postponement of the conveyance to the son or other beneficiary may be very easily accomplished even in England. The testator has simply to create a trust for an insignificant annuity, but attaching to the entire trust fund for the benefit of another person than the trustee himself. The son cannot then as a matter of absolute right call for a conveyance of the legal title, because he is not the sole *cestui que trust.* He must therefore appeal to the discretion of the court, which would not ordinarily defeat, under such circumstances, the ~~laudable~~ expectations of the testator. Harbin *v.* Masterman, 12 Eq. 559; Talbot *v.* Jevers, 20 Eq. 255; Weatherall *v.* Thornburgh, 8 Ch. D. 261. See also Harbin *v.* Masterman, '94, 2 Ch. 184.

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Where property is given to trustees upon trust for the children of a certain woman, and in default of children upon trust for another person, the one entitled upon default of children may compel a conveyance of the property by the trustee as soon as the woman, not having children, has become so old that in the estimation of the court she must continue childless. Forty *v.* Reay, Dart V. & P. (5th ed.) 345; Groves *v.* Groves, 12 W. R. 45; *Re* Widdow's Trusts, L. R. 11 Eq. 408; *Re* Millner's Estate, L. R. 14 Eq. 245; Brown *v.* Taylor, W. N. (1872), 190; Maden *v.* Taylor, 45 L. J. Ch. 569; Archer *v.* Dowsing, W. N. (1879), 43; *Re* Taylor, 29 W. R. 350; Croxton *v.* May, 9 Ch. D. 388; Davidson *v.* Kimpton, 18 Ch. D. 213; Browne *v.* Warnock, L. R. 7 Ir. 3; Mellon's Est., 16 Phila. 323.

But see Towle *v.* Delano, 144 Mass. 95; List *v.* Rodney, 83 Pa. 483. — ED.

[2] Only the opinion of the court is given. — ED.

Apparently, Adelbert E. Claflin was not quite twenty-one years old when his father died, but he some time ago reached that age and received ten thousand dollars from the trust. He has not yet reached the age of twenty-five years, and he brings this bill to compel the trustees to pay to him the remainder of the trust fund. His contention is, in effect, that the provisions of the will postponing the payment of the money beyond the time when he is twenty-one years old are void. There is no doubt that his interest in the trust fund is vested and absolute, and that no other person has any interest in it, and the weight of authority is undisputed that the provisions postponing payment to him until some time after he reaches the age of twenty-one years would be treated as void by those courts which hold that restrictions against the alienation of absolute interests in the income of trust property are void. There has, indeed, been no decision of this question in England by the House of Lords, and but one by a Lord Chancellor, but there are several decisions to this effect by Masters of the Rolls and by Vice Chancellors. The cases are collected in Gray's Restraints on Alienation, §§ 106–112, and Appendix II. See Josselyn *v.* Josselyn;[1] Saunders *v.* Vautier; Rocke *v.* Rocke;[2] *In re* Young's settlement;[3] *In re* Jacob's will;[4] Gosling *v.* Gosling;[5] Turnage *v.* Greene;[6] Battle *v.* Petway.[7]

These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the beneficiary on his reaching the age of twenty-one years, because in each case it was clear that such was not his intention, but on the ground that the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will.

This court has ordered trust property to be conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue, and all the persons interested in it were *sui juris* and desired that it be terminated; but we have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are necessarily void if the interest of the beneficiary is vested and absolute. See Smith *v.* Harrington;[8] Bowditch *v.* Andrew;[9] Russell *v.* Grinnell;[10] Inches *v.*

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[1] 9 Sim. 63.
[2] 9 Beav. 66.
[3] 18 Beav. 199.
[4] 29 Beav. 402.
[5] H. R. V. Johns. 265.
[6] 2 Jones Eq. 63.
[7] 5 Ired. 576.
[8] 4 Allen, 566.
[9] 6 Allen, 339.
[10] 105 Mass. 425.

Hill;[1] Sears *v.* Choate.[2] This is not a dry trust, and the purposes of the trust have not been accomplished if the intention of the testator is to be carried out.

In Sears *v.* Choate it is said, "Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary." In that case the plaintiff was the absolute owner of the whole property, subject to an annuity of ten thousand dollars payable to himself. The whole of the principal of the trust fund, and all of the income not expressly made payable to the plaintiff, had become vested in him when he reached the age of twenty-one years, by way of resulting trust, as property undisposed of by the will. Apparently the testator had not contemplated such a result, and had made no provision for it, and the court saw no reason why the trust should not be terminated, and the property conveyed to the plaintiff.

In Inches *v.* Hill, *ubi supra*, the same person had become owner of the equitable life estate and of the equitable remainder, and "no reason appearing to the contrary," the court decreed a conveyance by the trustees to the owner. See Whall *v.* Converse.[3]

In the case at bar nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that, because the testator has not imposed all possible restrictions, the restrictions which he has imposed should not be carried into effect.

The decision in Broadway National Bank *v.* Adams rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case are applicable to this, and for the reasons there given we are unable to see that the directions of the testator to the trustees, to pay the money to the plaintiff when he reaches the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

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[1] 106 Mass. 575.

[2] 146 Mass. 395.

[3] 146 Mass. 345.

In Sanford *v.* Lackland[1] a beneficiary who would have been entitled to a conveyance of trust property at the age of twenty-six became a bankrupt at the age of twenty-four, and it was held that the trustees should convey his interest immediately to his assignee, as "the strict execution of the trusts in the will have been thus rendered impossible." But whether a creditor, or a grantee of the plaintiff in this case would be entitled to the immediate possession of the property, or would only take the plaintiff's title *sub modo*, need not be decided. The existing situation is one which the testator manifestly had in mind and made provision for; the strict execution of the trust has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support, and we see no good reason why the intention of the testator should not be carried out. Russell *v.* Grinnell.[2] See Toner *v.* Collins;[3] Rhoads *v.* Rhoads;[4] Lent *v.* Howard;[5] Barkley *v.* Dosser;[6] Carmichael *v.* Thompson;[7] Lampert *v.* Haydel.[8]

Decree affirmed.[9]

RE BROWNE'S WILL.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JULY 29, 1859.

[*Reported in* 27 *Beavan*, 324.]

THE testator bequeathed to his three trustees, who were also his executors, the sum of £3,000 £3 per cent consolidated annuities, upon trust, to invest the same in the purchase of a government annuity, or if, from any cause, a difficulty should arise as to the purchase of a government annuity, then in an office for the insurance of life, or in some other good security, to be payable during the life of Louisa Harris; and to be held upon trust to pay the same unto Louisa Harris for her sole and separate use, free from the debts or control of any husband, and so that she should not anticipate the same. And he declared that her receipt should be a discharge for the same, but that, in case of illness or other incapacity of Louisa Harris to give such receipt, it should be lawful for his trustees, in their discretion and of their uncontrollable authority, to dispense with the same, and to manage the said annuity, and, from time to time, to apply the same for the maintenance and support, or, otherwise, for the personal benefit of Louisa Harris, during her life, at such times and in such manner as his trustees should think most conducive to her comfort and convenience.

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[1] 2 Dillon, 6.

[2] 105 Mass. 425.

[3] 67 Iowa, 369.

[4] 43 Ill. 239.

[5] 89 N. Y. 169.

[6] 15 Lea, 529.

[7] 5 Cent. Rep. 500.

[8] 20 Mo. App. 616.

[9] Avery *v.* Avery, 90 Ky. 613 (*semble*); Russell *v.* Grinnell, 105 Mass. 425; Hetzel *v.* Barber, 69 N. Y. 1, 12 (*semble*), *Accord.*

See also Rhoads *v.* Rhoads, 43 Ill. 239.

But if a trustee sees fit to convey to a *cestui que trust* who has the entire beneficial interest in the property, there is no one who has any standing to file a bill against the trustee even though the conveyance defeats the intention of the creator of the trust. Lemen *v.* McComas, 63 Md. 153. See Brophy *v.* Lawler, 107 Ill. 285. — ED.

Louisa Harris, who was unmarried, being advised that she was entitled to have the £3,000 consols transferred to her, instead of the annuity directed to be purchased therewith, elected to have the sum of consols transferred to her instead of the annuity, and she gave the executors notice, requiring them to transfer it to her. They refused so to do, and paid the amount into court under the Trustee Relief Act.

Louisa Harris now presented a petition, praying a declaration that she was entitled to the £3,000 consols, and that it might be transferred to her, accordingly.

Mr. Selwyn and *Mr. Fischer* cited Ford *v.* Batley.[1]

Mr. Hobhouse, for the executors.

THE MASTER OF THE ROLLS held that the petitioner was entitled to have the consols transferred to her.[2]

RE PHILBRICK'S SETTLEMENT.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., MARCH 27, 1865.

[*Reported in* 34 *Law Journal Reports, Chancery*, 368.]

BY a deed-poll, dated the 4th of March, 1846, a fund was vested in trustees, upon trust, for the separate use of Hannah Philbrick, a married woman, for her life, and after her death upon such trusts as she should by will appoint.

By her will, dated the 20th of June, 1856, and expressed to be made in pursuance of the power, Hannah Philbrick appointed the fund to various persons, giving a life-interest in part of it to her husband, and appointed two executors. She died in June, 1864, and her executors proved her will.

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The trustees of the deed-poll being in doubt whether they ought to hand over the trust-fund to the executors, or to distribute it themselves among the appointees, paid the fund into court under the Trustee Relief Act.

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[1] 17 Beav. 303.

[2] Stokes *v.* Cheek, 28 Beav. 620; Gott *v.* Nairne, 3 Ch. D. 278 (*semble*); Biggs *v.* Peacock, 22 Ch. Div. 284; *Re* Mabbett, '91, 1 Ch. 707, 712; Fluke *v.* Fluke, 16 N. J. Eq. 478; Morse *v.* Hackensack Bank, 47 N. J. Eq. 279; Huber *v.* Donoghue, 49 N. J. Eq. 125; Savage *v.* Sherman, 24 Hun, 307 (*semble*); Prentice *v.* Janssen, 79 N. Y. 478; Armstrong *v.* McKelvey, 104 N. Y. 179; Greenland *v.* Waddell, 116 N. Y. 234; Mellen *v.* Mellen, 139 N. Y. 210; McDonald *v.* O'Hara, 144 N. Y. 566 *Accord*.

See Pearson *v.* Lane, 17 Ves. 101; Ford *v.* Batley, 17 Beav. 303; Hetzel *v.* Barber, 69 N. Y. 1. — ED.

The executors thereupon presented a petition for the payment to them of the fund, to be administered by them in accordance with the appointment contained in the will.

Mr. Baggallay, and *Mr. Hardy*, for the petitioners.

Mr. Charles Ball, for the trustees of the deed-poll, submitted that they were the proper persons to distribute the fund.[1]

THE MASTER OF THE ROLLS said that where the donee of a general power appointed the property to certain persons beneficially, the original trustees were bound to carry the appointment into execution; but if the donee appointed the property to trustees, those trustees were entitled to receive the property to be held upon the trusts declared by the donee; and when a married woman made a will in exercise of a power, and appointed executors, inasmuch as she could only make her will by virtue of the power, and could only have appointed the executors for the purpose of administering the appointed property, she must be considered to have appointed the property to the executors as trustees.

The expression in the judgment in Platt *v.* Routh, that the executor could not have administered any part of the appointed property, only meant that, "but for the will exercising the power," the executor could not have administered.

By the appointment of executors, the duty of administering the fund was, in his Honor's opinion, taken away from the original trustees, and committed to the executors; and the provisions of the 23 Vict. c. 15, rather confirmed this view than otherwise. The fund must, therefore, be paid to the petitioners.[2]

BUSK *v.* ALDAM.

IN CHANCERY, BEFORE SIR R. MALINS, V. C., NOVEMBER 3, 1874.

[*Reported in Law Reports*, 19 *Equity*, 16.]

THIS was a demurrer. The statements in the bill were as follows: — By will, dated in 1839, T. B. Pease, after giving £5,000 to three trustees, upon trust, to invest and pay the income to his daughter, Hannah Ford, for her life, with power to her to appoint the fund to her children "in such manner" as she should direct, and in default of appointment to her children in equal shares, gave a sum of £10,000 to the same trustees upon like trust for his daughter, Susanna Busk, and with like power to her to appoint.

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[1] The argument for the trustees is omitted. — ED.

[2] Cooper *v.* Thornton, 3 Bro. C. C. 96, 186; Angier *v.* Stannard, 3 M. & K. 566, 571; Wetherell *v.* Wilson, 1 Keen, 80, 86; Poole *v.* Pass, 1 Beav. 600; Hayes *v.* Oatley, L. R. 14 Eq. 1; *Re* Hoskin's Trusts, 5 Ch. D. 229; 6 Ch. D. 281, s. c., *Accord.*

In the last case cited, Sir W. M. James, L. J., said, p. 283: "I may add that, if the merits had to be gone into, I should hold it to be established beyond all question that where a *feme covert*, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will, and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund." See also Olney *v.* Balch, 154 Mass. 318. — ED.

By will, dated in 1868, Susanna Busk appointed the fund of £10,000 amongst the objects of the power, three of whom were, and still are, infants, and directed that it should be paid and transferred to the trustees of her will.

The present bill was filed against the trustees of the will of T. B. Pease by the trustees of the will of Mrs. Busk, to compel payment and transfer to them of the fund of £10,000. The defendants demurred.

Davey, for the defendants, said that the direction to transfer the fund to new trustees was not authorized by the words creating the power, inasmuch as the power was special, not general.

Cookson, for the plaintiffs, contended that the transfer should be granted on the ground of convenience and authority.[1]

SIR R. MALINS, V. C., after stating the facts, continued: So far as the appointment by Mrs. Busk to trustees is concerned, it has been held by a long series of decisions that it is a valid exercise of the power of appointment, and that the appointment is just as good as if it had been made direct to the objects of the power. But this bill is filed for the purpose of having the fund transferred from the trustees in whose control it is now placed to those to whom it is appointed. For what object this is desired I cannot understand. It is said that it would be very convenient to have the fund placed in the hands of the new trustees. But I cannot look at that. I must consider what was intended to be done by the original testator; and I can see that such a transfer as is asked would violate his intention. I asked Mr. Cookson whether he contended that a mere appointment of new trustees by the donee of the power would have been valid, and he pressed upon me that, on the authority of the cases cited, the court was bound to hand over the fund to the new trustees.

Now there is, first of all, the case of Thornton *v.* Bright,[2] which simply decides that an appointment to a person not an object of a power as trustee for a person who is an object is a valid exercise of the power; and there are also Kenworthy *v.* Bate,[3] Trollope *v.* Linton,[4] Cowx *v.* Foster,[5] and Fowler *v.* Cohn.[6] But those were all cases where there was real estate to be converted and no person appointed to effect the conversion, and it was decided that in that case an appointment to trustees to sell and convert and distribute the proceeds amongst the objects of the power was a valid execution of the power. But I am unable to see how that can be an authority for taking away a fund from trustees who are fit and proper, and handing it over to others who may not be so fit, in a case where the duty of the trustees is simply to hold the fund.

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[1] This statement of the case is taken from 23 W. R. 21. The arguments of counsel are omitted. — ED.

[2] 2 My. & Cr. 230.

[3] 6 Ves. 793.

[4] 1 S. & S. 477.

[5] 1 J. & H. 30.

[6] 21 Beav. 360.

I am asked to treat these cases as establishing a general law, that where, in all cases, a fund is settled upon trust for a mother for life, and then upon trust for her children as she should appoint, and she appoints to trustees for her children, the first trustees are bound to hand over the fund to the trustees appointed by the daughter. Here nothing more is required than that some one should hold the fund, and it is suggested that I am bound to hand it over to the second trustees.

Mr. Cookson says that I decided the point in Ferrier *v.* Jay.[1] But what I there decided was, that where there was a general and a special power, and an appointment was made of both funds together to trustees in trust to pay debts and to apply the residue for the objects of the special power, the appointment must be read *reddendo singula singulis*, and the fund coming under the general power applied in the first instance to the purposes to which the fund subject to the special power was not applicable. I agreed with the decision in Cowx *v.* Foster,[2] that the circumstance of directing debts to be paid only meant that they were to be paid out of the particular portion of the mixed fund which could be so applied.

I did also, in that case, undoubtedly, say that the second trustees were the most fit persons to have charge of the fund; but I did not say that where it was a mere question which of two sets of trustees should hold a particular fund, the court would, necessarily, hand it over to the second set in point of date.

The demurrer will be allowed.[3]

ONSLOW *v.* WALLIS.

In Chancery, before Lord Cottenham, C., November 21, 22, 1849.

[*Reported in* 1 *Hall and Twell,* 513.[4]]

By indentures of lease and release, dated in July, 1837, A. L. Sarel conveyed the lands in controversy to Wallis, in fee simple upon trust, however, for Louisa Sarel. Louisa Sarel died in 1847. She devised all her lands to the plaintiffs in fee simple, upon trust to convert the same into money and to stand possessed of the money upon trust, in the first place, to pay thereout her debts, funeral, and testamentary expenses, and legacies; and then to pay the legacies given by her in a certain memorandum, signed by her, and marked with the letter A.

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[1] L. R. 10 Eq. 550.

[2] 1 J. & H. 30.

[3] *In re* Tyssen, '94, 1 Ch. 56 *Accord.*

See Scott *v.* Loner, 25 Ch. D. 535, 545, per North, J., and s. c. 31 Ch. Div. 380, 386, per Cotton, L. J. — Ed.

[4] 1 MacN. & G. 506, s. c. — Ed.

The memorandum marked with the letter A. had not been found.

It was alleged by the bill, and admitted by the answer, that there were debts of the testatrix which her personal estate was not sufficient to pay. The trustees under the will applied to the defendant to convey the hereditaments to them as such trustees; but he insisted that he was entitled to hold them for his own benefit, subject to the payment of such portion of the charges created by the will as were properly chargeable thereon, and which he offered to pay.

The bill prayed that the defendant might be decreed to convey and assure to them, as such devisees as aforesaid, the hereditaments comprised in the deeds of July, 1837.[1]

The cause was heard by the Vice-Chancellor of England, on the 16th January, 1849, when he ordered a conveyance to be executed by the defendant, according to the prayer of the bill.[2]

The defendant now appealed from that decision.

Mr. Humphry, and *Mr. Bird*, for the plaintiffs.

Mr. Rolt and *Mr. Prior*, contra.

The Lord Chancellor. No case similar to this has been cited, where the owner of property which was on trust has given it to somebody else; and whether it was so given beneficially or not, is a question which the defendant has no right to inquire into. It is not like the case of Burgess *v.* Wheate. The only reason why the trustee, under such circumstances as existed in that case, is allowed to hold property, is because there is nobody to take it from him; it does not belong to any person whom the law recognizes as having the right to ask for the execution of the trust. Now here the original owner, undoubtedly, had a right, as against the trustee, to direct what he should do with the property; he was a mere naked trustee. The testatrix, in this case, had a right to do what she pleased with the beneficial interest, and she did by her will direct the legal estate to be conveyed, or, at least, gave the property, to the trustees of her will. The question is, whether the defendant, who appears to be the trustee of the legal estate, has any right to inquire for what purpose these parties are to hold the trust property. It is a gift, in trust, it is true; but it is the appointment of persons who are to stand in the place of the original owner, as against the trustee. Then why is the beneficial interest which is, by the operation of the rule of law, in Burgess *v.* Wheate, to enure to the benefit of trustees, to enure to the benefit of this trustee? There is no want of persons authorized, as against him, to require a transfer of the beneficial interest. Suppose the testatrix had simply directed that the estate should be transferred, and had appointed new trustees, and directed the existing trustee to convey to those who are trustees under the will, could the trustee of the legal estate dispute the title of the trustees under the will, because they might or might not have the means of carrying into effect the trusts of the will?

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[1] The statement of the case is abridged, and the arguments of counsel are omitted. — Ed.

[2] 16 Sim. 483. — Ed.

The real question is, whether it is regulated by the doctrine in Burgess *v.* Wheate. I think that it is not regulated by the doctrine in Burgess *v.* Wheate at all, because that case proceeds on the fact of there being no persons having a right to control the legal estate, and here there are persons authorized to control the legal estate.

I do not take exactly the view which the Vice-Chancellor seems to have done, because he seems to have considered that the matter would depend on the presumed intention of the testatrix. For that purpose, you are to assume she intended that the paper A. should not be produced, and therefore there would be a failure of her declared intention. Therefore, if there is any trustee who is to have the benefit of the doctrine in Burgess *v.* Wheate, the trustees under the will are to have it. It cannot be considered that the testatrix had any such view at all. It must be presumed, she intended that the purposes declared by her will should be carried into effect. Those purposes have failed, in consequence of that paper A. not being produced; it may be produced hereafter, or it may not. I do not proceed on that ground, but I proceed on this, — that there are persons appointed by the owner of the property, to whom the property is to be conveyed. They are the only parties having a right to it; whether or not they have power afterwards to dispose of all the beneficial interest, is a matter with which the defendant Wallis, as mere owner of the legal estate, has nothing whatever to do.

This seems to me to be a case which does not fall within the doctrine of Burgess *v.* Wheate, so far as the defendant, Wallis, is concerned; and, therefore, the direction of the Vice-Chancellor for a conveyance, under the terms of the will, is, I think, a proper decree, and it must be affirmed, with costs.[1]

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[1] Compare *Re* Lashmar, '91, 1 Ch. 258.

If X. is a trustee for A., and A. assigns his equitable interest to B. in trust for C., B. is entitled to demand a conveyance of the legal estate from X., and C. is not a necessary party to the bill. Angier *v.* Stannard, 3 M. & K. 566. — ED.

SECTION II.

The Duty to put Cestui que Trust in possession of the Trust-res.

TIDD *v.* LISTER AND OTHERS.

IN CHANCERY, BEFORE SIR JOHN LEACH, V. C., NOVEMBER 20, 1820.

[*Reported in* 5 *Maddock*, 429.]

THE VICE-CHANCELLOR.[1] The testator in this case, after giving to his wife and daughter the personal occupation of the house in which he resided, and the use of his furniture, has devised and bequeathed his whole real and personal property to certain trustees upon trust, in the first place, to pay his funeral expenses, and debts, then to keep the buildings upon his estate, consisting of freehold, copyhold, and leasehold, insured against loss or damage by fire; next, to pay the premiums of certain policies of assurance on the lives of his two sons, which are to form a provision for their widows and children; then to pay annuities of sixty guineas each to his two sons; and, lastly, he has given the surplus income between his wife and daughter during their joint lives, and the whole surplus income to the survivor for life; and in case his two sons should survive his wife and daughter, then he gives to them his whole real and personal estate. Soon after the death of the testator, a bill was filed in this court for the execution of the trusts of his will, and in the progress of that suit the debts and funeral expenses were paid out of the personal estate, and the residue of the personal estate was secured in the name of the Accountant-General, and is of an amount sufficient to satisfy the two annuities of sixty guineas each, given to the sons, who do, accordingly, receive the same from the Accountant-General. The premiums of the policies of assurance continue to be paid out of the rents and profits of the estates. The mother died in the year 1819, and the daughter, who is become entitled to the whole surplus income of the real and personal estate, has married. The mother, the two sons, and two other persons were the trustees named in the will; one of these persons is dead, the other has but little interfered in the trusts of the will, one of the sons is abroad, and the management of the property has principally devolved upon the son, William Lister. The present bill ~~is filed by the daughter~~ and her husband, praying a conveyance, surrender, and assignment of the legal estate from the trustees, and that the plaintiffs may be let into ~~possession~~, or that a receiver may be appointed. The prayer for the conveyance, surren-

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[1] Only the opinion of the court is given. — ED.

der, and assignment was abandoned at the bar, but it was insisted that it is a matter of course in a court of equity, to divest a trustee of the management of the trust property, and to deliver the possession to the *cestui que trust* for life. And that the only difficulty here was, that the trustees are in the first place directed to pay certain premiums upon policies of assurance, which remained to be provided for out of the rents and profits of the estates, and that to remove this difficulty the daughter's husband was willing to invest in the cause a sum sufficient to answer the amount of those annual payments; and the case of Blake *v.* Bunbury [1] was cited as an authority for this doctrine.

My first impressions were strongly against the existence of any such rule. It is perfectly plain from the continuing nature of this trust that the testator intended that the actual possession of the trust property should remain with the trustees; and it did appear to me a singular proposition that if a testator who gives, in the first instance, a beneficial interest for life only, thinks fit to place the direction of the property in other hands, which is an obvious means of securing the provident management of that property for the advantage of those who are to take in succession, that it should be a principle in a court of equity to disappoint that intention, and to deliver over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have to prefer his own immediate interest to the fair rights of those who are to take in remainder. Independently of the purpose of management of the property, a testator may be considered in the case of a female *cestui que trust* for life, as having a further view to her personal protection in the case of her marriage.

The husband can only compel the trustee to account to him for the wife's income by the aid of a court of equity; and this court, in certain cases of misconduct by the husband, will not compel the trustee to account to the husband, but will secure the income for the benefit of the wife. It is manifest that this protection would, to some extent, be prejudiced, if the husband were put into the possession of the trust estate.

The case of Blake *v.* Bunbury is no authority for the proposition for which it was cited. It was not the case of a *cestui que trust* for life, but the case of a legal tenant for life, subject to a term for raising a charge. There was there no purpose but to raise the charge, and the legal tenant for life, securing the charge, had, upon every principle, a right to the possession. There may be cases in which it may be plain from the expressions in the will that the testator did not intend that the property should remain under the personal management of the trustees. There may be cases in which it may be plain from the nature of the property that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence.[1] There may be very special cases in which this court would deliver the possession of the property to the *cestui que trust* for life, although the testator's intention appeared to be that it should remain with the trustees, as where the personal occupation of the trust property was beneficial to the *cestui que trust*, there the court taking means to secure the due protection of the property for the benefit of those in remainder, would, in substance, be performing the trust according to the intention of the testator. The present case is not one of special circumstances. It is not the personal occupation, but the management of the property that is sought by this bill.

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[1] 1 Ves. Jr. 194; 1 Ves. Jr. 514; 4 Bro. C. C. 21, s. c.

The *cestui que trust* for life is a *feme covert*. Two of the trustees are the persons who, if they survive the wife, will be entitled to this property. The testator has thought fit to place his property in their hands, and out of the management of the *cestui que trust* for life, and I have no authority to revoke his will.

There is, however, in this bill a prayer for a receiver, and allegations of misconduct to support that prayer. These allegations are denied by the answer, and not proved. But I find in the answer that the acting trustee, William Lister, expresses himself to be willing that a receiver should be appointed. If the plaintiffs desire a receiver, they are entitled to it upon this consent of the trustee.[2]

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[1] Baylies *v.* Baylies, 1 Coll. 537; Powys *v.* Blagrave, Kay, 495, 4 D. M. & G. 448; Williamson *v.* Wilkins, 14 Ga. 416, 422; Wade *v.* Powell, 20 Ga. 645.

See also Kay *v.* Powel, 1 Ves. Jr. 408; Denton *v.* Denton, 7 Beav. 388; Horner *v.* Wheelwright, 2 Jur. N. S. 367; Hoskins *v.* Campbell, W. N. (1869), 59; Etchells *v.* Williamson, W. N. (1869), 61; Young *v.* Miles, 10 B. Mon. 287. — ED.

[2] See to the same effect Pugh *v.* Vaughan, 12 Beav. 517; Taylor *v.* Taylor, 20 Eq. 297, 3 Ch. D. 145; Davis *v.* Hunter, 23 Ga. 172; Cox *v.* Williams, 5 Jones, Eq. 150; Weckham *v.* Berry, 55 Pa. 70.

The effect of Tidd *v.* Lister has been greatly modified in England by the Settled Land Acts, as appears from the following extract from the opinion of Kekewich, J., in West *v.* Wythes, '93, 2 Ch. 369, 374: "My conclusion is that the old authorities, of which Tidd *v.* Lister may be taken to be the type, and which were summarized by the late Master of the Rolls in Taylor *v.* Taylor, 20 Eq. 297, may be treated as largely, if not altogether, abrogated by the Acts just mentioned. I must not be understood as saying that even now an equitable tenant for life, where the trustees in whom the legal estate is vested have duties of management and the like to perform, is entitled, as a matter of course, to be let into possession; but I intend to hold that the powers granted to and the duties imposed on a tenant for life, as defined by the *Settled Land Acts*, have raised a presumption in favor of the title to possession which did not before exist, and ~~have~~ made it incumbent on the Court to provide that, if the estate and the trustees can be adequately protected by reasonable safeguards, an equitable tenant for life shall be let into possession and be enabled personally to exercise these powers and discharge these duties unless there be found some reason to the contrary far more urgent than is disclosed by any of the terms of this will." See also *In re* Bentley, 54 L. J. Ch. 782; *In re* Bagot, '94, 1 Ch. 177; *In re* Newen, '94, 2 Ch. 297.

Under the same Acts, Kekewich, J., following *In re* Burnaby, 42 Ch. D. 621, decided that the equitable tenant for life was entitled to the custody of the title deeds.

In Williamson *v.* Wilkins, 14 Ga. 416, an equitable life tenant of certain stocks was allowed to maintain a bill to compel the trustee to execute a power of attorney in favor of the *cestui que trust*, so that he might collect the dividends himself, and thereby save the commission to which otherwise the trustee would be entitled. — ED.

SECTION III.

The Duty to give Information in regard to the Trust Estate.

In re TILLOTT. LEE *v.* WILSON.

In Chancery, before Sir J. W. Chitty, J., November 13, 1891.

[*Reported in Law Reports* (1892), 1 *Chancery*, 86.]

The plaintiff, being one of several *cestuis que trustent*, commenced this action by originating summons, and asked by his summons that the defendant, as trustee of the testator's will, might be directed to sign and deliver to the plaintiff an authority enabling the plaintiff, his solicitor and agents, to ascertain the amount of consols standing in the name of the defendant, and what stop orders and *distringases* (if any) had been placed thereon, and to produce all deeds, papers, and documents in his possession relating to the property held by the defendant as trustee of the will, and to furnish the plaintiff with a general account of the residuary estate.

By an order made in chambers dated the 3d of August, 1891, it was ordered that the defendant should forthwith write a letter to the Bank of England authorizing the bank to inform the plaintiff ~~as to the~~ amount of consols standing in the name of the defendant, or to verify the same by affidavit, and to produce for the inspection of the plaintiff all deeds and documents relating to property in which the plaintiff was interested under the will of the testator. The defendant accordingly wrote the letter to the bank, as directed by order.

This was a motion by the plaintiff that the above order might be discharged or varied, and that the defendant might be directed to sign and deliver to the plaintiff, an authority to the bank, enabling the plaintiff to ascertain what stops, notices, or *distringases* had been placed on the consols standing in the name of the defendant.[1]

Chitty, J. In pursuance of an order made in chambers the defendant has written a letter to the bank, on the authority of which the bank has given to the plaintiff information which shows that a sum of stock is actually standing in the name of the trustee. The plaintiff, however, requires something more; he asks for an authority which will enable him to obtain information from the bank as to whether there are any stop orders on the fund; his object in asking for this information is to deal with his own share in the trust estate, his share being one-twelfth, to which he is entitled contingently on the death of his mother. It is no part of the duty of a trustee to assist his *cestui que trust* in mortgaging, or, as Lord Justice Lindley added, "in squandering or anticipating his fortune," Low *v.* Bouverie[2], but a trustee is bound to give his *cestui que trust* proper information as to the investment of the trust estate, and where the trust estate is invested on mortgage, it is not sufficient for the trustee merely to say, "I have invested the trust money on a mortgage," but he must produce the mortgage deeds, so that the *cestui que trust* may thereby ascertain that the trustee's statement is correct, and that the trust estate is so invested. The general rule, then, is what I have stated, that the trustee must give information to his *cestui que trust* as to the investment of the trust estate. Where a portion of the trust estate is invested in consols, it is not sufficient for the trustee merely to say that it is so invested, but his *cestui que trust* is entitled to an authority from the trustee to enable him to make proper application to the bank, as has been done in this case, in order that he may verify the trustee's own statement; there may be stock standing in the name of a person who admits he is a trustee of it, which at the same time is incumbered, some other person having a paramount title may have obtained a charging order on the stock or placed a *distringas* upon it.

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[1] The statement is abridged and arguments are omitted. — Ed.

[2] [1891] 3 Ch. 82, 99.

The question here is whether the *cestui que trust* is not entitled, in addition to the information that he has obtained, to the further authority to the bank for information which will, besides verifying the trustee's statement, that the trust money is invested in the stock, also enable him to ascertain that the stock is free from incumbrance or free from any paramount claim. In the case before me there is no suggestion that the trustee is wrong, there is no charge of any sort made against him, though Mr. Wheeler tried to suggest a possible case, and did suggest that there might be some kind of paramount claim affecting the stock in question, yet there is no suggestion to be found on the evidence in the case; but still, I think, now that the matter has been brought before me and discussed, that the *cestui que trust* is entitled to the further information that he now asks for, which will enable him to go back with an authority from the trustee, on which the bank will shew that the fund is either clear of all *distringases* and the like or that it is not. I quite agree with what fell from counsel for the defendant that this may give the plaintiff more information than he is entitled to ask, because, as there are twelve shares in this fund, it may be that there are several *distringases* on the fund obtained by persons who have charges on the contingent interest of the other persons, and it is clear that the trustee is not bound to give the *cestui que trust* of one share any information as to the dealings of the other *cestui que trust* in whose share he has no interest, showing whether those shares are or are not incumbranced. I think, then, for these reasons, that there ought to be a further order in the terms the plaintiff asks for, but the plaintiff must pay the costs of the motion.[1]

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[1] Low *v.* Bouverie, '91, 3 Ch. 82, 99, per Lindley, L. J.; Sawyer *v.* Goddard, 95, 1 Ch. 474 *Accord.*

A trustee is regularly bound to produce for the inspection of the *cestui que trust* all deeds and documents in his possession relating to the trust estate. Clark *v.* Ormonde,

Jac. 108, 120; Gough *v.* Offley, 5 De G. & Sm., 253; Bugden *v.* Tylee, 21 Beav. 545; Smith *v.* Barnes, L. R. 1 Eq. 65; Simpson *v.* Bathurst, 5 Ch. 193, 202; *In re* Cowin, 33 Ch. D. 179.

In like manner a trustee must produce opinions of counsel procured by him to guide him in the due administration of the trust. Devaynes *v.* Robinson, 20 Beav. 42; Wynne *v.* Humberston, 27 Beav. 42; Talbot *v.* Marshfield, 2 Dr. & Sm. 549; *Re* Mason, 22 Ch. D. 609. But opinions procured by a trustee with a view to defending himself against legal proceeding by the *cestui que trust* are privileged, Brown *v.* Oakshott, 12 Beav. 252; Talbot *v.* Marshfield, 2 Dr. & Sm. 549; unless the trustee and the counsel are combining fraudulently or unfairly against the *cestui que trust.* Follett *v.* Jeferys, 1 Sim. N. S. 3; Russell *v.* Jackson, 9 Hare, 387; *Re* Postlethwaite, 35 Ch. D. 722.

In Wynne *v.* Humberston, *supra,* Sir John Romilly, M. R., said, p. 423: "There can be no question that the rule is, that where the relation of trustee and *cestui que trust* is established, all cases submitted and opinions taken by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defence in any litigation against himself, must be produced to the *cestui que trust.* They are taken for the purpose of administration of the trust, and for the benefit of the persons entitled to the trust estate, who will have to pay the expense thereby incurred."

ACCOUNTS. — A trustee is bound to keep clear and accurate accounts of the trust property and to produce them for the inspection of the *cestui que trust.* White *v.* Lincoln, 8 Ves. 363; Freeman *v.* Fairlie, 3 Mer. 24, 43; Anon. 4 Mad. 273; Pearse *v.* Green, 1 Jac. & W. 135, 140; Clarke *v.* Ormonde, Jac. 108, 120; Turner *v.* Corney, 5 Beav. 515; Gray *v.* Haig, 20 Beav. 219; Springett *v.* Dashwood, 2 Giff 521; Kemp *v.* Burn, 4 Giff. 348; Wroe *v.* Seed, 4 Giff. 425; Lewin, Trusts, (9th Ed.) 1109; Green *v.* Brooks, 81 Cal. 328; Waterman *v.* Alden, 144 Ill. 90; Loud *v.* Winchester, 52 Mich. 174; Blauvelt *v.* Ackerman, 23 N. J. Eq., 495; Elmer *v.* Loper, 25 N. J. Eq. 475, 482; *In re* Gaston, 35 N. J. Eq. 60, 348; Martin *v.* Wilbourne, 66 N. Ca. 321; Walker *v.* Sharpe, 71 N. Ca., 257; Libbett *v.* Maultsby, 71 N. Ca. 345; Hartman's Ap., 90 Pa. 203; Dugan's Est., 17 Phila. 454; Booth *v.* Sineath, 2 Strob. Eq. 31.

See further, Walker *v.* Symonds, 3 Sw. 38; Ottley *v.* Gibby, 8 Beav. 602; Newton *v.* Askey, 11 Beav. 145, 152; Burrows *v.* Walls, 5 D. M. & G. 233, 253; Sloo *v.* Law, 3 Blatchf. 459. — ED.

SECTION IV.

The Duty as to Investment of Trust Funds.

HOLMES *v.* DRING.

IN CHANCERY, BEFORE SIR L. KENYON, M. R., APRIL 14, 1788.

[*Reported in* 2 *Cox, Equity Cases,* 1.]

THE plaintiff (an infant) was entitled to a sum of £300 under a will, which the two defendants, the executors, residing in the country, lent on private security of a bond in which a surety joined, and which was made to both the executors. The obligors were in very ample circumstances at the time the money was lent, but afterwards becoming insolvent, the plaintiff now charged the executors with the money.

Madocks and *Mitford* for the executors argued, that persons in the country could not so readily invest money in the public funds as those who resided on the spot, and that if they lent so small a sum as this upon such security as might reasonably be considered at the time as ample and unquestionable, and such as a prudent man would lend his own money upon, it would be a hard measure to charge them with any loss that might happen by the unexpected failure of such security. And Madocks mentioned a case in Gilb. Rep. 10, to shew that the Court considered an executor as justifiable in lending trust money on private security, if he took the security of more than one solvent person.

MASTER OF THE ROLLS. As to the case in Gilbert, it cannot be an authority for what is contended for; the bond of several persons cannot be distinguished from the bond of one person, as applied to this case. It was never heard of that a trustee could lend an infant's money on private security. This is a rule that should be rung in the ears of every person who acts in the character of trustee, for such an act may very probably be done with the best and honestest intention, yet no rule in a Court of Equity is so well established as this. I must, therefore, direct an account against the executors of this money, and order them to pay it in moieties, with interest, at 4 per cent, and I am bound to make them pay the costs of the cause.[1]

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[1] Terry *v.* Terry, 1 Eden, 149, n. (*a*), 3 Sw. 80 n. (*a*); Anon. Lofft, 492; Adye *v.* Feuilleteau, 1 Cox, Eq. 24; Keble *v.* Thompson, 3 Bro. C. C. 112; Wilkes *v.* Steward, G. Cooper, 6; Pocock *v.* Redington, 5 Ves. 794, 799; Vigrass *v.* Binfield, 3 Mad. 62; Walker *v.* Symonds, 1 Sw. 1, 63 (overruling Harden *v.* Parsons, 1 Eden, 145, and Hale's case, 3 Sw. 63 n. (*b*)); Clough *v.* Bond, 3 M. & Cr. 490, 496; Darke *v.* Martyn, 1 Beav. 525; Rehden *v.* Wesley, 29 Beav. 213; *In re* Tucker, 94, 1 Ch. 724; Perley *v.* Snow, 1 Ritchie, Eq. 373; Worts *v.* Worts, 18 Ont. 332; Barney *v.* Saunders, 16 How. 535, 545; Lewis *v.* Cook, 18 Ala. 334 (*semble*); Moore *v.* Hamilton, 4 Fla. 112; State *v.* Johnson,

A. KING *v.* C. N. TALBOT AND OTHERS.

IN THE COURT OF APPEALS, NEW YORK, MARCH, 1869.

[*Reported in* 40 *New York Reports*, 76.]

WOODRUFF, J.[1] It is conceded, that in England, the rule is, and has long been settled, that a trustee, holding funds to invest for the benefit of his *cestui que trust*, is bound to make such investment in the public debt, for the safety whereof the faith of their government is pledged; or in loans, for which real estate is pledged as security. And that, although the terms of the trust commit the investment, in general terms, to the discretion of the trustee, that discretion is controlled by the above rule, and is to be exercised within the very narrow limits which it prescribes.

As a purely arbitrary rule, resting upon any special policy of that country, or on any peculiarity in its condition, it has no application to this country. It is not of the common law. It had no applicability to the condition of this country while a colony of Great Britain, and cannot be said to have been incorporated in our law.

So far, and so far only, as it can be said to rest upon fundamental principles of equity, commending themselves to the conscience, and suited to the condition of our affairs, so far it is true, that it has appropriate application and force, as a guide to the administration of a trust, here, as well as in England.

I do not, therefore, deem it material to inquire, through the multitude of English cases, and the abundant texts of the law writers, into the origin of the rule in England, or the date of its early promulgation. Nor, in this particular case, do I deem it necessary to determine whether it should, by precise analogy, be deemed to prohibit here investments in any other public debt than that of the State of New York.

Neither, in my judgment, are we at liberty, in the decision of this case,

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7 Blackf. 529; Mattocks *v.* Moulton, 84 Me. 545, 552; Hunt *v.* Gontrum (Md. 1894), 30 Atl. R. 620; Harding *v.* Larned, 4 All. 426; Clark *v.* Garfield, 8 All. 427; Judge *v.* Mathes, 60 N. H. 433 (but see Knowlton *v.* Bradley, 17 N. H. 458); Gray *v.* Fox, Saxton, 259; Vreeland *v.* Schoonmaker, 16 N. J. Eq. 512; Sherman *v.* Lanier, 39 N. J. Eq. 249; Brewster *v.* Demarest, 40 N. J. Eq. 559; Smith *v.* Smith, 4 John. Ch. 281; Baskin *v.* Baskin, 4 Lans. 90; Le Fever *v.* Hasbrouck, 2 Dem. 567; *Re* Foster, 15 Hun, 387; *Re* Cant, 5 Dem. 269; *Re* Blauvelt, 20 N. Y. Sup. 119; Nyce's Est., 5 Watts & S. 254; (but see *Re* Ogle, 5 Barr, 15); Swyer's App. 5 Barr, 377; Wills' App. 22 Pa. 325; Frankenfield's App. 127 Pa. 369, n.; Baer's App., 127 Pa. 360; Nance *v.* Nance, 1 S. Ca. 209; Dunn *v.* Dunn, 1 S. Ca. 350; Davidson *v.* Moore, 14 S. Ca. 251; Wynne *v.* Warren, 2 Heisk. 118 *Accord.*

Higgins *v.* McClure, 7 Bush, 379; Barney *v.* Parsons, 54 Vt. 623 *Contra.*

The creator of the trust may authorize investments upon personal security alone. Denike *v.* Harris, 84 N. Y. 89. — ED.

[1] Only so much of the opinion of the Court is given as relates to the propriety of the trustees' investment. — ED.

to propound any new rule of conduct, by which to judge of the liability of trustees now subjected to examination. Under trusts heretofore created, the managers thereof performed their duty with the aid of rules for the exercise of their discretion which were the utterance of equity and good conscience, intelligible to their understanding, and available for their information; otherwise, trusts heretofore existing have been traps and pitfalls to catch the faithful, prudent, and diligent trustee, without the power to avoid them.

But it is not true, that there is no underlying principle or rule of conduct in the administration of a trust which calls for obedience. Whether it has been declared by the courts or not, whether it has been enacted in statutes or not, whether it is in familiar recognition in the affairs of life, there appertains to the relation of trustee and *cestui que trust*, a duty to be faithful, to be diligent, to be prudent in an administration entrusted to the former, in confidence in his fidelity, diligence, and prudence.

To this general statement of the duty of trustees there is no want of promulgation or sanction, nor want of sources of information for their guidance. In the whole history of trusts, in decisions of courts for a century in England, in all the utterances of the courts of this and the other States of this country, and not less in the conscious good sense of all intelligent minds, its recognition is uniform.

The real inquiry, therefore, is, in my judgment, in the case before us, and in all like cases: Has the administration of the trust, created by the will of Charles W. King for the benefit of the plaintiff, been governed by fidelity, diligence, and prudence? If it has, the defendants are not liable for losses which, nevertheless, have happened.

This, however, aids but little in the examination of the defendants' conduct, unless the terms of definition are made more precise. What are fidelity, diligence, and discretion? and what is the measure thereof, which trustees are bound to possess and exercise?

It is hardly necessary to say, that fidelity imports sincere and single intention to administer the trust for the best interest of the parties beneficially interested, and according to the duty which the trust imposes. And this is but a paraphrase of "good faith."

The meaning and measure of the required prudence and diligence has been repeatedly discussed, and with a difference of opinion. In extreme rigor, it has sometimes been said, that they must be such and as great as that possessed and exercised by the Court of Chancery itself. And again, it has been said, that they are to be such as the trustee exercises in the conduct of his own affairs, of like nature, and between these is the declaration, that they are to be the highest prudence and vigilance or they will not exonerate.

My own judgment, after an examination of the subject, and bearing in mind the nature of the office, its importance, and the considerations which alone induce men of suitable experience, capacity, and responsibility to accept its usually thankless burden, is, that the just and true rule is, that the trustee is bound to employ such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters employ in their own like affairs.

This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made.

It, therefore, does not follow, that, because prudent men may, and often do, conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund, and the procurement of a just income therefrom, are primary objects of the creation of the trust itself, and are to be primarily regarded.

If it be said, that trustees are selected by the testator, or donor of the trust, from his own knowledge of their capacity, and without any expectation that they will do more than, in good faith, exercise the discretion and judgment they possess, the answer is: *First*, the rule properly assumes the capacity of trustees to exercise the prudence and diligence of prudent men, in general; and, *second*, it imposes the duty to observe and know, or learn what such prudence dictates in the matter in hand.

And once more, the terms of the trust, and its particular object and purpose, are, in no case, to be lost sight of in its administration.

Lewin, in his Treatise on the Law of Trusts, &c. (p. 332), states, as the result of the several cases, and as the true rule, that "a trustee is bound to exert *precisely* the *same* care and solicitude in behalf of his *cestui que trust*, as he would do for himself; but *greater* measure than this, a court of equity will *not* exact." In general, this is true, but if it imports that if he do what men of ordinary prudence would not do, in their own affairs, of a like nature, he will be excused, on showing that he dealt with his own property in like want of discretion, it cannot be sustained, as a safe or just rule towards *cestuis que trust;* nor is it required by reasonable indulgence to the trustee; it would be laying the duty to be prudent out of view entirely, and I cannot think the writer intended it should be so understood.

The Massachusetts cases (9 Pick. 140; 20 Pick. 116), cited by the counsel for the defendants, are in better conformity with the rule, as I have stated it.

To apply these general views to the case before us, and with the deductions which necessarily flow from their recognition: The testator gave to each of his children fifteen thousand dollars, the *interest* on the same, so far as required, to be applied to their maintenance and education, and the *principal*, with any accumulations thereon, to be paid to them severally on their majority; appointed the defendant, Talbot, and his partner, Mr. Olyphant, executors, "entrusting to their discretion the settlement of my affairs and the investment of my estate for the benefit of my heirs."

If I am correct in my views of the duty of trustees, this last clause neither added to, nor in any wise affected the duty or responsibility of these executors; without it, they were clothed with discretion; with it, their discretion was to be exercised with all the care and prudence belonging to their trust relation to the beneficiaries. Such is the distinct doctrine of the cases very largely cited by the counsel for the parties, and is, I think, the necessary conclusion from the just rule of duty I have stated.

What, then, was the office of the trustees, as indicated by the terms and nature of the trust? If its literal reading be followed, it directed that "fifteen thousand dollars" in money be placed at "interest." The nature of the trust, according to the manifest intent of the testator, required that, in order to the maintenance and support of infant children, whose need, in that regard, would be constant and unremitting, that interest should flow in with regularity and without exposure to the uncertainties or fluctuations of adventures of any kind. And then the fund should continue, with any excess of such interest accumulated for their benefit, so as to be delivered at the expiration of their minority.

Palpably, then, the *first* and obvious duty was to place that fifteen thousand dollars in a state of security; *second*, to see to it that it was productive of interest; and *third*, so to keep the fund, that it should always be subject to future recall for the benefit of the *cestui que trust*.

I do not attach controlling importance to the word "interest" used by the testator, but I do regard it as some guide to the trustees, as an expression of the testator that he did not contemplate any adventure with the fund, with a view to profits as such.

But, apart from the inference from the use of that word, I think it should be said, that whenever money is held upon a trust of this description, it is not according to its nature, nor within any just idea of prudence, to place the principal of the fund in a condition in which it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked, and in which, by the *very terms of the investment*, the principal is not to be returned at all.

It is not denied, that the employment of the fund as capital in trade would be a clear departure from the duty of trustees. If it cannot be so employed under the management of a copartnership, I see no reason for saying that the incorporation of the partners tends, in any degree, to justify it.

The moment the fund is invested in bank, or insurance, or railroad stock, it has left the control of the trustees; its safety and the hazard or risk of loss is no longer dependent upon their skill, care, or discretion in its custody or management, and the terms of the investment do not contemplate that it ever will be returned to the trustees.

If it be said, that, at any time, the trustees may sell the stock, (which is but another name for their interest in the property and business of the corporation), and so repossess themselves of the original capital, I reply, *that* is necessarily contingent and uncertain; and so the fund has been voluntarily placed in a condition of uncertainty, dependent upon two contingencies: *First*, the practicability of making the business profitable; and, *second*, the judgment, skill, and fidelity of those who have the management of it for that purpose.

If it be said, that men of the highest prudence do, in fact, invest their funds in such stocks, becoming subscribers and contributors thereto, in the very formation thereof, and before the business is developed, and in the exercise of their judgment on the probability of its safety and productiveness, the answer is, so do just such men, looking to the hope of profitable returns, invest money in trade, and adventures of various kinds. In their private affairs, they do, and they lawfully may, put their principal funds at hazard; in the affairs of a trust they may not. The very nature of their relation to it forbids it.

If it be said, that this reasoning assumes, that it is certainly practicable so to keep the fund that it shall be productive, and yet safe against any contingency of loss; whereas, in fact, if loaned upon bond and mortgage, or upon securities of any description, losses from insolvency and depreciation may, and often do happen, notwithstanding due and proper care and caution is observed in their selection. Not at all. It assumes and insists, that the trustees shall not place the fund where its safety and due return to their hands will depend upon the success of the business in which it is adventured, or the skill and honesty of other parties entrusted with its conduct; and it is in the selection of the securities for its safety and actual return, that there is scope for discretion and prudence, which, if exercised in good faith, constitute due performance of the duty of the trustees.

My conclusion is, therefore, that the defendants were not at liberty to invest the fund bequeathed to the plaintiff, in stock of the Delaware and Hudson Canal Company; of the New York and Harlem Railroad Company; of the New York and New Haven Railroad Company; of the Bank of Commerce; or of the Saratoga and Washington Railroad Company; and that the plaintiff was not bound to accept these stocks, as and for his legacy, or the investment thereof.

In regard to the bonds of the Hudson River Railroad Company, and of the Delaware and Hudson Canal Company, it appears by schedule B., given in evidence, that the former were mortgage bonds; but what was the extent or sufficiency of the security afforded by such mortgage, or what property was embraced in it, does not appear, nor does it appear, whether there was any security whatever for the payment of the canal company's bond.

It is not necessary for the decision of this case, and I am not prepared to say, that an investment in the bonds of a railroad, or other corporation, the payment whereof is secured by a mortgage upon real estate, is not suitable and proper under any circumstances.

If the real estate is ample to insure the payment of the bonds, I do not, at present, perceive that it is necessarily to be regarded as inferior to the bond of an individual secured by mortgage; it would, of course, be open to all the inquiries which prudence would suggest, if the bond and mortgage were that of an individual. The nature, the location, and the sufficiency of the security, and the terms of the mortgage, and its availability for the protection and ultimate realization of the fund, must, of course, enter into the consideration.

But it is not necessary to pursue that subject. The plaintiff, in his complaint, rejects the entire investment. The court below held, that it was equitable that the plaintiff should be held to receive the whole or none of the stocks and bonds, and to that ruling neither the plaintiff nor the defendants have excepted; and therefore, the question, whether the judgment below was correct in that respect is not before us.

It is proper, however, to say, that I do not clearly apprehend the propriety of that ruling, unless it be on the ground that the plaintiff, in his complaint, did so elect.

The rule is perfectly well settled, that a *cestui que trust* is at liberty to elect to approve an unauthorized investment, and enjoy its profits, or to reject it at his option; and I perceive no reason for saying, that where the trustee has divided the fund into parts and made separate investments, the *cestui que trust* is not at liberty, on equitable as well as legal grounds, to approve and adopt such as he thinks it for his interest to approve. The money invested is his money; and in respect to each and every dollar, it seems to me, he has an unqualified right to follow it, and claim the fruits of its investment, and that the trustee cannot deny it. The fact, that the trustee has made other investments of other parts of the fund which the *cestui que trust* is not bound to approve, and disaffirms, cannot, I think, affect the power. For example, suppose, in the present case, the *cestui que trust*, on delivery to him of all the securities and bonds in which his legacy had appeared invested, had declared: Although these investments are improperly made, not in accordance with the intent of the testator, nor in the due performance of your duty, I waive all objection on that account, except as to the stock of the Saratoga and Washington Railroad Company. That, I reject and return to you. Is it doubtful that his position must be sustained?

Approve by pt.

The result is, that the main features of the judgment herein must be affirmed.

All the judges concur in the result to which Judge WOODRUFF arrived.

MURRAY, J., thought it a settled principle of law, in this State, that a trustee, holding trust funds, for investment for the benefit of minor children, must invest in Government or real estate securities, and that any other investment would be a breach of duty, and the trustee would be personally liable for any loss. GROVER, DANIELS, and JAMES, JJ., concurred. HUNT, Ch. J., MASON and LOTT, JJ., *contra.*[1]

WILLIAM A. DICKINSON, APPELLANT.

IN THE SUPREME COURT, MASSACHUSETTS, SEPTEMBER 5, 1890.

[*Reported in* 152 *Massachusetts Reports*, 184.]

APPEAL from a decree of the Probate Court, disallowing in part the account of William A. Dickinson as trustee under a deed of trust. Hearing before C. Allen, J., who reported the case for the determination of the full court.[2]

G. Wells (*J. Barnes* with him), for the appellant.

D. W. Bond, contra.

FIELD, C. J. The general principles which should govern a trustee in making investments, when the creator of the trust has given no specific directions concerning investments, have been repeatedly declared by this court. Harvard College *v.* Amory,[1] Lovell *v.* Minot,[2] Brown *v.* French,[3] Bowker *v.* Pierce,[4] Hunt, appellant.[5]

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[1] Emelie *v.* Emelie, 7 Bro. P. C. 259; Trafford *v.* Boehm, 3 Atk. 440; Mills *v.* Mills, 7 Sim. 501; Howe *v.* Dartmouth, 7 Ves. 137, 150; Davies *v.* Hodgson, 25 Beav. 177; Hynes *v.* Redington, 1 J. & Lat. 589, 7 Ir. Eq. 405 s. c.; Randolph *v.* East Birmingham Co., Ala. '94, 16 S. R. 126; 1 Mills, Ann. St. Colorado, (1891) p. 248, § 359; Tucker *v.* State. 72 Ind. 242; Smith *v.* Smith, 7 J. J. Marsh. 238; Clark *v.* Anderson, 13 Bush, 111, 119; Lathrop *v.* Smalley, 23 N. J. Eq. 192; Ashurst *v.* Potter, 29 N. J. Eq. 625, 632; Tucker *v.* Tucker, 33 N. J. Eq. 235; *Re* Mundy, 3 N. J. L. J. 185; *Re* Voorhees, 3 N. J. L. J. 211; Ackerman *v.* Emott, 4 Barb. 626; Adair *v.* Brimmer, 74 N. Y. 539; Mills *v.* Hoffman, 26 Hun, 594; Cook *v.* Cook, 34 Fed. Rep. 249 (New York law); Hemphill's App. 18 Pa. 304; Worrell's App., 23 Pa. 44; Pray's App., 34 Pa. 100; Ihmsen's App. 43 Pa. 431; 1 Brightly's Purdon's Dig. (12th Ed. 1894) p. 35, § 69; Simmons *v.* Oliver, 74 Wis. 633 *Accord.*

See also Mattocks *v.* Moulton, 84 Me. 545, 554.

The same rule has been adopted by statute in some jurisdictions where, formerly, trustees had a wide latitude in investments. Bowen *v.* Wright, 39 Ga. 96; Moses *v.* Moses, 50 Ga. 9; Bell *v.* Sawyer, 59 N. H. 393. (Compare Kimball *v.* Reding, 31 N. H. 352; French *v.* Currier, 47 N. H. 88.

By Lord St. Leonards's Act, 22 & 23 Vict. c. 35 § 32, trustees were authorized to invest in Bank of England Stock, Bank of Ireland Stock, or East India Stock. By the Trust Investment Act, 1889, the field of legitimate investment was enlarged so as to include Metropolitan Board of Works, or London County Council stock, preferred stock in railroad or water companies of Great Britain and Ireland, which for ten consecutive years preceding had paid 3 per cent dividends on the common stock, Corporation or County Council stock and Water Commission stock.

By the Trustee Act, 1893, 56 & 57 Vict. c. 53, a trustee may invest in certain other securities, analogous to those mentioned in the Trust Investment Act of 1889.

By 2 Tenn. St. (1871) § 3664, b. trustees may invest in "public stocks or bonds of the United States." — ED.

[2] The judge's report is omitted. — ED.

The rule in general terms is, that a trustee must in the investment of the trust fund act with good faith and sound discretion, and must, as laid down in Harvard College *v.* Amory, at page 461, "observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

It is said in the opinion in Brown *v.* French, *ubi supra*: "If a more strict and precise rule should be deemed expedient, it must be enacted by the Legislature. It cannot be introduced by judicial decision without working great hardship and injustice." It is also said, "The question of the lawfulness and fitness of the investment is to be judged as of the time when it was made, and not by subsequent facts which could not then have been anticipated." A trustee in this Commonwealth undoubtedly finds it difficult to make satisfactory investments of trust property. The amount of funds seeking investment is very large; the demand for securities which are as safe as is possible in the affairs of this world is great; and the amount of such securities is small, when compared with the amount of money to be invested. Trusts frequently provide for the payment of income to certain persons during their lives, as well as for the ultimate transfer of the corpus of the trust property to persons ascertained, or to be ascertained, at the termination of the trust; and a trustee must, so far as is reasonably practicable, hold the balance even between the claims of the life tenants and those of the remaindermen. The life tenants desire a large income from the trust property, but they are only entitled to such an income as it can earn when invested in such securities as a prudent man investing his own money, and having regard to the permanent disposition of the fund, would consider safe. A prudent man possessed of considerable wealth, in investing a small part of his property, may wisely enough take risks which a trustee would not be justified in taking. A trustee, whose duty it is to keep the trust fund safely invested in productive property, ought not to hazard the safety of the property under any temptation to make extraordinary profits. Our cases, however, show that trustees in this Commonwealth are permitted to invest portions of trust funds in dividend paying stocks and interest bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments.[6]

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[1] 9 Pick. 446.
[2] 20 Pick. 116.
[3] 125 Mass. 410.
[4] 130 Mass. 262.
[5] 141 Mass. 515.
[6] Lamar *v.* Micou, 112 U. S. 452, 114 U. S. 218 (Alabama Law); Foscue *v.* Lyon,

The experience of recent years has, perhaps, taught the whole community that there is a greater uncertainty in the permanent value of railroad properties in the unsettled or newly settled parts of this country than was anticipated nine years ago. Without, however, taking into consideration facts which are now commonly known, and confining ourselves strictly to the evidence in the case, and the considerations which ought to have been present to the mind of the appellant, when in May and August, 1881, he made the investments in the stock of the Union Pacific Railroad Company, we think it appears that he acted in entire good faith, and after careful inquiry of many persons as to the value of the stock and the propriety of the investments. We cannot say that it is shown to our satisfaction that the trustee so far failed to exercise a sound discretion that the investments should be held to be wholly unauthorized. Still, it must have been manifest to any well informed person in the year 1881, that the Union Pacific Railroad ran through a new and comparatively unsettled country; that it had been constructed at great expense, as represented by its stock and bonds, and was heavily indebted; that its continued prosperity depended upon many circumstances which could not be predicted; and that it would be taking a considerable risk to invest any part of a trust fund in the stock of such a road.

In this case the whole trust fund appears, by the first account, to have been $16,260.05. On May 9, 1881, the trustee bought thirty shares of the stock of the Union Pacific Railroad Company at $119 per share, which, with commissions, amounted to $3,573.75. This is an investment of between one fourth and one fifth of the whole trust fund in this stock, and is certainly a large investment relatively to the whole amount of the trust fund to be made in the stock of any one corporation. After this, on August 16, 1881, he purchased twenty shares more at $123 per share, amounting with commissions to $2,475. The last investment, we think, cannot be sustained as made in the exercise of a sound discretion. While we recognize the hardship of compelling a trustee to make good out of his own property a loss occasioned by an investment of trust property which he has made in good faith, and upon the advice of persons whom he thinks to be qualified to give advice, we cannot on the evidence hold that the trustee was justified in investing in such stock as this so large a proportional part of the property.

It appears by the report of the single justice before whom the case was tried, that "the time has now come for a final distribution of said

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55 Ala. 440, 452; Gray *v.* Lynch, 8 Gill, 403; McCoy *v* Horwitz, 62 Md. 183; Harvard College *v.* Amory, 9 Pick. 446; Lovell *v.* Minot, 20 Pick. 116; Kinmonth *v.* Brigham, 5 All. 270, 277; Brown *v.* French, 125 Mass. 410; Bowker *v.* Pierce, 130 Mass. 262; Hunt, App., 141 Mass. 515, Smyth *v.* Burns, 25 Miss. 422; Washington *v.* Emery, 4 Jones, Eq. 32, (but see Collins *v.* Gooch, 97 N. Ca. 186); Peckham *v.* Newton, 15 R. I. 321; Boggs *v.* Adger, 4 Rich. Eq. 408 (but see Allen *v.* Gaillard, 1 S. Ca. 279) *Accord.* — Ed.

trust fund." It does not appear that, when the first account was allowed, there was any adjudication of the questions now before us, and they are not therefore *res judicata*, and no assent to these investments is shown on the part of the persons now entitled to the trust property. The result is, that this last investment is disallowed, and that the trustee must be charged with the amount of it, to wit: $2,475, and with simple interest thereon from August 16, 1881, and must be credited with any dividends therefrom which he has received and paid over, with simple interest on each, from the time each dividend was received.

The decree of the Probate Court must be modified in accordance with this opinion. *Decree accordingly.*

CANN *v.* CANN.

IN CHANCERY, BEFORE KAY, J., OCTOBER 31, 1884.

[*Reported in* 33 *Weekly Reporter*, 40.]

ADJOURNED SUMMONS. This was an application by the defendants to vary the chief clerk's certificate, whereby a sum of £138 11*s.* 4*d.* had been disallowed.

KAY, J.[1] It is extremely difficult in these cases to know where to draw the line. Here there is an estate producing £700 a year. A mortgage of £500 is paid off, and the trustees pay that money into a bank for the purpose of getting another mortgage.[2] The question is, whether it was within their powers as trustees to leave that sum in the bank for fourteen months. It seems to me that that was too long. If after six months they could not get a mortgage they ought to have invested in Consols. Without attempting to draw a hard and fast line, — for I consider that each of these cases must be judged on its merits, — I say that leaving that money in the bank for fourteen months was leaving it there too long. The moment they began to leave the money there too long they became responsible for all the consequences of their default; and they are therefore liable for the £138 which has been lost. I must dismiss the summons with costs.[3]

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[1] Only the opinion of the court is given.—ED.

[2] The money remained on deposit from May, 1869, to July 16th, 1870, when the bank failed. The loss thereby occasioned amounted to £138 11*s.* 4*d.* — ED.

[3] In the following cases the trustee, having allowed the deposit in the bank to stand for an unusually long time, was charged with the loss occasioned by the failure of the bank: Moyle *v.* Moyle, 2 Russ. & My. 710; Rehden *v.* Wesley, 29 Beav. 213; Barney *v.* Saunders, 16 How. 535; Woodley *v.* Holley, 111 N. Ca. 380.

If the amount deposited is large, it should be withdrawn without delay and invested. Ashbury *v.* Beasley, 17 W. R. 638.

So if a trustee is under a duty to make immediate payment of the trust fund, it is no longer a question of reasonable time. He loans the fund at the bank at his peril.

In re ARGUELLO.

In the Supreme Court, California, January 14, 1893.

[*Reported in* 97 *California Reports,* 196.]

Belcher, C.[1] This is an appeal by the administrator of the estate of the decedent from an order of the Superior Court of San Diego County requiring him to pay to the creditors of the estate whose claims had been duly presented and allowed certain sums of money.

The sum of money in controversy was $4,846.80, which was received by the administrator for and on account of the estate, between July 5, 1891, and October 15, 1891, and deposited by him in the California Savings Bank, in the city of San Diego, in his own name.

The court below found the facts to be as follows: —

"That at the time said funds were deposited by said administrator in said California Savings Bank, said bank was reputed to be and was considered a safe and solvent bank and place of deposit, and was of good credit and standing, and was believed by said administrator to be solvent and safe; that said deposit was made in the individual name" of the administrator, "without any designation or indication of his representative capacity, but said administrator had no other funds or account with said bank, and deposited such with that particular bank for the express purpose of keeping the same separate from, and so that it would not be unnecessarily mingled with, his own property or individual funds."

"That in depositing said funds in said California Savings Bank as aforesaid, said administrator acted in good faith."

"That on the twelfth day of November, 1891, said California Savings Bank became suddenly, unexpectedly, and wholly insolvent, sus-

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Darke *v.* Martyn, 1 Beav. 525; Gough *v.* Etty, 20 L. T. Rep. 358; Lunham *v.* Brandell, 27 L. J. Ch. 179; Ricks *v.* Broyles, 78 Ga. 610.

But, as is implied in the principal case, a trustee having funds in his hands not immediately applicable to the purposes of the trust, may deposit them for a reasonable time in a bank, taking care to have the credit run to him in his fiduciary capacity. Atty-Gen. *v.* Randall, 21 Vin. Ab. 534; Rowth *v.* Howell, 3 Ves. Jr. 565; Adams *v.* Claxton, 6 Ves. 226; France *v.* Woods, Taml. 172; Dorchester *v.* Effingham, Taml. 279; Johnson *v.* Newton, 11 Hare, 160; Wilks *v.* Groom, 3 Drew. 584; Fenwick *v.* Clarke, 4 D. F. & J. 240; Swinfen *v.* Swinfen, 29 Beav. 211; *Re* Marcou, 40 L. J. Ch. 537; *In re* Earl, 39 W. R. 107; Munnerlyn *v.* Augusta Bank, 88 Ga. 333; Norwood *v.* Harness, 98 Ind. 134; Jacobus *v.* Jacobus, 37 N. J. Eq. 17; People *v.* Faulkner, 107 N. Y. 477, 488; Law's Est., 144 Pa. 499; Ramsey *v.* McGregor, 1 Cincin. S. C. 327; Odd Fellows *v.* Ferson, 3 Oh. C. C. 84.

The deposit may or may not draw interest, but if it is for a fixed time, it becomes an investment upon the credit of the bank; and as such an investment is improper the trustee must make good any loss by reason of the failure of the bank. Baskin *v.* Baskin, 4 Lans. 90; Frankenfield's App. 127 Pa. 369, n.; Baer's App., 127 Pa. 360; Law's Est., 144 Pa. 499 (*semble*).| 64 Fed. 685

A trustee may properly remit money to a distance through the agency of a broker in good credit. Knight *v.* Plymouth, 1 Dick. 120. — Ed.

[1] Only the opinion of the court is given. — Ed.

pended business, and has not been able to pay the amount so deposited by said administrator with it, or any part thereof."

"That said administrator has been guilty of no negligence or want of care in the administration of said estate, except that he deposited such funds in the California Savings Bank in his individual name, instead of in his representative capacity, or in the name of the estate."

And as conclusions of law the court found that the administrator was responsible for the money so deposited by him, and that he must pay it over to the creditors of the estate.

The appellant contended that an administrator is only required to act in good faith, and to exercise such skill, prudence, and diligence in managing the affairs of the estate as men ordinarily bestow upon their own affairs; and that when he has, in good faith and with reasonable care, deposited funds of the estate in bank, which have been subsequently lost by the failure of the bank, he will not be held liable for the loss, unless he has wilfully and unnecessarily mingled the trust property with his own, so as to constitute himself in appearance its absolute owner; and hence that, under the facts found in this case, the order of the court was erroneous, and should be reversed.

The question presented has many times been before the courts of England and of this country, and the decisions upon it have been practically unanimous, and to the same effect as the decision of the court below in this case.

The law upon the subject is stated in Perry on Trusts, sec. 443: "A trustee may deposit money temporarily in some responsible bank or banking-house; and if he acted in good faith and with discretion, and deposited the money to a trust account, he will not be liable for its loss, . . . but he will be liable for the money in case of a failure of the bank, or for its depreciation, if he deposits it to his *own credit*, and not to the separate account of the trust estate." And again, in sec. 463: "So if the trustee pays the money into a bank in his own name, and not in the name of the trust, he will be responsible for the money in case of the failure of the bank."

A reference to a few of the numerous cases cited will be sufficient.[1] . . .

But whatever may be the rule elsewhere, the appellant insists that the rule in this State is declared in sec. 2236 of the Civil Code, and that that does not make him liable. The section referred to reads as follows: —

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[1] The learned Chief Commissioner here quoted at some length from Commonwealth *v.* McAlister, 28 Pa. 480, Williams *v.* Williams, 55 Wis. 300, and Naltner *v.* Dolan, 108 Ind. 500. In the Williams case the court said: "To hold the administrator answerable in this case is undoubtedly a great hardship; but to exonerate him from liability is to encourage the mismanagement of trust funds and to open the doors to frauds innumerable against those whose age and weakness entitle them to the most rigid protection of the law. The rule, therefore, should not be slackened, even if the question were a new one, much less in view of the authorities cited." — ED.

"Sec. 2236. A trustee who wilfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety at all events."

We do not think this section was intended to change the rule generally prevailing, or to limit liability under it; on the contrary, the section seems to be in entire accord with the general rule, and in effect to declare it in unmistakable terms.

In our opinion the order appealed from should be affirmed.

Vanclief, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.[1]

Paterson, J., Garoutte, J., Harrison, J.

Ex parte CATHORPE.

In Chancery, before Lord Thurlow, C., May 28, 1785.

[*Reported in* 1 *Cox, Equity Cases*, 182.]

Upon an application to lay out on a mortgage a sum of £3,000 in the hands of the Accountant General, belonging to the lunatic's estate,

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[1] Walker *v.* Symonds, 3 Sw. 1, 66; Ditmar *v.* Boyle, 53 Ala. 169; Harward *v.* Robinson, 14 Ill. Ap. 560; Gilbert *v.* Welsch, 75 Ind. 557; State *v.* Greensdale, 106 Ind. 364 (criticising Richardson *v.* State, 55 Ind. 381); Naltner *v.* Dolan, 108 Ind. 500; Jenkins *v.* Walker, 8 Gill & J. 218; Coffin *v.* Bramlitt, 42 Miss. 194; Knowlton *v.* Bradley, 17 N. H. 458; Baskin *v.* Baskin, 4 Lans. 90; Summers *v.* Reynolds, 95 N. Ca. 404; Morris *v.* Wallace, 3 Barr, 319; Draper *v.* Joiner, 9 Humph. 612; Lyell *v.* Hammond, 2 Lea, 378, 390 (*semble*); Williams *v.* Williams, 55 Wis. 300; Book *v.* Wilkinson, 78 Wis. 652 *Accord.*

Atterberry *v.* McDuffeé, 31 Mo. Ap. 603; (see State *v.* Roeper, 82 Mo. 57); Parsley *v.* Martin, 77 Va. 376 — *Contra.*

A fortiori the trustee must answer for the solvency of the bank, where the trust money is blended with the trustee's individual account. Wren *v.* Kirton, 11 Ves. 377; Fletcher *v.* Walker, 3 Mad. 73 (*semble*); Massey *v.* Banner, 4 Mad. 413, 1 J. & W. 241, 247; Robinson *v.* Ward, 2 C. & P. 59; McDonnell *v.* Harding, 7 Sim. 178; Pennell *v.* Deffell, 4 D. M. & G. 372, 392; Noble *v.* Hammond, 129 U. S. 65; De Jarnette *v.* De Jarnette, 41 Ala. 708; Henderson *v.* Henderson, 58 Ala. 582; Webster *v.* Pierce, 35 Ill. 158, 163; Drovers' Bank *v.* O'Hare, 18 Ill. Ap. 182; Clay *v.* Clay, 3 Met. (Ky.) 548; Cartnell *v.* Allard, 7 Bush, 482; Norris *v.* Hero, 22 La. An. 605; Coleman *v.* Lipscomb, 18 Mo. Ap. 443; Jacobus *v.* Jacobus, 37 N. J. Eq. 17, 20; *Re* Stafford, 11 Barb. 353; Prescott's Estate, 1 Tuck. 430; Shaw *v.* Banman, 34 Oh. St. 25; Morris *v.* Wallace, 3 Barr, 319; Stanley's App. 8 Barr, 431; McAllister *v.* Commw., 30 Pa. 536, 28 Pa. 480; Law's Est., 144 Pa. 499, 506; Allen *v.* Leach (Pa. 1894), 29 Atl. R. 1050; Mason *v.* Whitthorne, 2 Cold. 242; *In re* Hodges (Vermont, 1894) 28 Atl. R. 663 (overruling Barney *v.* Parsons, 54 Vt. 623); Vaiden *v.* Stubblefield, 28 Grat. 153.

But see *contra*, Crane *v.* Moses, 13 S. Ca. 561.

If a trustee mixes specific money of the trust fund with his own coins or bills, and some of the mixed money is stolen, the loss will fall on the trustee, unless he can identify his own money among the coins or bills remaining. Bartlett *v.* Hamilton, 46 Me. 435; Shipp *v.* Hettrick, 63 N. C. 329. — Ed.

Madocks produced several orders of the same nature, which had been made in this very lunacy. But the LORD CHANCELLOR said, that although he was perfectly convinced, by what was stated to him, that this security was perfectly good, yet he could not permit such a precedent to be made; and that he was aware that in former times the court had laid out the money not only of lunatics but of infants in this manner; but in latter times the court had considered it as improper to invest any part of the lunatic's estate upon a private security, and it would be a dangerous precedent to break in upon that rule; and he therefore directed the money to be laid out in the 3 per cent. Bank annuities.[1]

FIRST MORTGAGES OF REAL ESTATE. — Lord Harcourt in Brown *v.* Litton, 1 P. Wms. 140; Lord Hardwicke in Knight *v.* Plymouth, 1 Dick. 120, 126; and Lord Alvanley in Pocock *v.* Redington, 5 Ves. 794, 800, thought trust funds might properly be invested in first mortgages of land. But Lord Thurlow's view to the contrary was generally approved in England. Widdowson *v.* Duck, 2 Mer. 494; *Re* Fust, 1 Coop. t. Cottenham, 157 n. (c); Norbury *v.* Norbury, 4 Mad. 121; *Ex parte* Ellice, Jac. 234; Ridgeway, 1 Hog. 309; *Ex parte* Johnson, 1 Moll. 128; *Re* Franklyn, 1 De G. & Sm. 528; Berry *v.* Marriott, 2 De G. & Sm. 491; Raby *v.* Ridehalgh, 7 D. M. & G. 104. By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, § 32, first mortgages on real estate were made legitimate trust investments. In this country the same rule has generally been made without a statute. But a contributory mortgage is not a proper investment under the English statute. Webb *v.* Jonas, 39 Ch. D. 660. The mortgage of the franchise and tracks of a horse railroad was held to be improper for an investment in Judd *v.* Williams, 2 Dem. 404.

SECOND MORTGAGES. — In several jurisdictions it is a breach of trust to invest in second mortgages. Gen. St. Conn. (1888) § 495; Maddocks *v.* Moulton, 84 Me. 545; Gilmore *v.* Tuttle, 32 N. J. Eq. 611, 36 N. J. Eq. 617; Porter *v.* Woodruff, 36 N. J. Eq. 174; Savage *v.* Gould, 60 How. Pr. 234; *Re* Petrie, 5 Dem. 352; Singleton *v.* Lowndes, 9 S. Ca. 465.

There are *dicta* to the same effect in Thomson *v.* Christie, 1 Macq. 236, 238; Drosier *v.* Brereton, 15 Beav. 221; Lockhart *v.* Reilly, 1 De G. & J. 464, 476; Sheffield Society *v.* Aizlewood, 44 Ch. D. 412, 459. But in Want *v.* Campain (Ch. D. 1893) 94 Law Times, 385 (see also Norris *v.* Wright, 14 Beav. 291, 308) it was said that investment in second mortgages was not absolutely prohibited, but that the trustee had the burden of overcoming the presumption against the fitness of such an investment. See, to the same effect, Waring *v.* Waring, 3 Ir. Ch. 331, 337; Shuey *v.* Latta, 90 Ind. 136; Whitney *v.* Martine, 88 N. Y. 535, 539, 540; King *v.* Mackellar, 109 N. Y. 215, 221.

In *Re* Blauvelt's Est. 20 N. Y. Sup. 119 and in Jack's Ap., 94 Pa. 369, investments in second mortgages were sanctioned. See also Bogart *v.* Jackson, 4 Edw. 718; Lechler's Ap., 21 W. N. C. (Pa.) 505.

EQUITABLE MORTGAGES. — A trustee is not permitted to invest in equitable mortgages. Webb *v.* Ledsam, 1 K. & J. 385; Swaffield *v.* Nelson, W. N. (1876) 255.

LEASEHOLD MORTGAGES. — Investment upon the security of leaseholds is a breach of trust. Wyatt *v.* Sherratt, 3 Beav. 498; Fyler *v.* Fyler, 3 Beav. 551; Fuller *v.* Knight, 6 Beav. 205; *In re* Chennell, 8 Ch. Div. 492; *In re* Boyd, 14 Ch. Div. 626; unless the leaseholds are for a long term of years at a nominal rent. Macleod *v.* Annesley, 16 Beav. 600; *In re* Chennell, 8 Ch. Div. 492.

Leasehold mortgages were not formerly "real securities." *In re* Boyd, 14 Ch. D. 626; Leigh *v.* Leigh, 55 L. T. Rep. 634; but by Trustee Act, 1888, 51, 52 Vict, c. 59, § 9, a power to invest in real securities anthorizes an investment upon mortgage of property held for an unexpired term of not less than 200 years, and at a rent not greater than one shilling a year. See also Trustee Act 1893, c. 53, § 5.

THE PURCHASE OF LAND OR CHATTELS with the trust funds is a breach of trust unless specially authorized by the terms of the trust. Ouseley v. Anstruther, 10 Beav. 452, 456; Campbell *v.* Miller, 38 Ga. 304 (chattels); Williams *v.* Williams, 35 N. J. Eq. 100; Eckford *v.* De Kay, 8 Paige, 89; Baker *v.* Disbrow, 18 Hun, 29, 3 Redf. 348 (*cestui que trust* may take the estate with profits, or principal and interest. But in estimating profits, the whole series of transactions must be considered); Royer's App., 11 Pa. 36 (compare Bonsall's Ap., 1 Rawle, 273; Bellington's Ap., 3 Rawle, 55); Morton *v.* Adams, 1 Strob. Eq. 72, 76; Mathews *v.* Heyward, 2 S. C. N. S. 239 (but see *Ex parte* Calmes, 1 Hill, Ch. 112); Ryder *v.* Sisson, 7 R. I. 341 (chattels).

CONFEDERATE BONDS. — Investment in Confederate bonds was lawful during the existence of the Confederacy. McClure *v.* Stull, 14 Rich. Eq. 105 (compare Snelling *v.* McCreary, 14 Rich. Eq. 291; Mayer *v.* Mordecai, 1 S. Ca. 383; Creighton *v.* Pringle, 3 S. C. 77); Waller *v.* Cattell, 83 Va. 200.

FOREIGN INVESTMENTS. — As a rule investments in property without the jurisdiction of the trustees are not proper; but they will be sanctioned in special cases if in conformity with the object of the trust. Amory *v.* Green, 13 All. 413 (*semble*) (Dwelling-house case); Ormiston *v.* Olcott, 84 N. Y. 339; *Re* Denton, 103 N. Y. 607; *Re* Myers, 131 N. Y. 409; Rush's Est., 12 Pa. 375, 378 (*semble*); *Ex parte* Copeland, Rice, Eq. 69. — ED.

STATE STATUTES REGULATING INVESTMENTS. — Deering's Civil Code, California (1886), § 2261. A trustee must invest the trust money "in such manner as to afford reasonable security and interest for the same."

1 Mills, Ann. St. Colorado (1891), p. 248, § 359. "No act of the General Assembly shall authorize the investment of trust funds . . . in the bonds or stock of any private corporation."

Gen. Sts. Conn. (1888), § 495. "Trust funds . . . may be loaned on the security of mortgages on unencumbered real estate in this State, double in value the amount loaned, or may be invested in such mortgages, or in the bonds or loans of this State, or of any town, city, or borough of this State, or in any bonds, stocks, or other securities which the savings banks in this State are or may be authorized by law to invest in, or may be deposited in savings banks incorporated by this State."

Rev. St. Fla. (1892), § 2189. Trustee is allowed to deposit trust funds with a banking company organized under the chapter in the Revised Statutes relating to banking companies, or to invest the same in its capital stock.

Georgia Code (1873), § 2330. Trust funds may be invested in "stocks, bonds, or other securities issued by this State. . . . Any other investments must be made under an order of the Superior Court, . . . or else at the risk of the trustee."

Ky. St. (1894), § 4706. Trustees may invest in "real estate, mortgage notes or bonds, or in such other interest-bearing or dividend-paying securities as are regarded by prudent business men as safe investments, and to make loans with such securities as collateral; but such funds shall not be invested in the bonds or securities of any railroad, or other corporation, unless such railroad, or other corporation has been in operation more than ten years, and, during that time, has not defaulted in the payment of principal or interest on its bonded debt, or be invested in the bonds of a county, district, town, or city, that, within ten years, has defaulted in the payment of the interest or principal of its bonded debt."

1 Rev. St. Ohio (1890), § 6413. Investments must be in "the certificates of this State, or of the United States, or in such other security as may be approved by the court having control of the administration of the trust."

1 Brightly's Purdon's Dig. (12th Ed.), 1894, p. 35, § 69. "No Act of the General Assembly shall authorize the investment of trust funds . . . in the bonds or stocks of any private corporation."

New Hampshire, Pub. St. 553, § 11, 505, § 9. Trustees may invest in "notes secured by mortgage of real estate at least double in value of the notes, in some incorporated

IN RE SALMON. PRIEST *v.* UPPLEBY.

IN THE COURT OF APPEAL, JUNE 19, 1889.

[*Reported in* 42 *Chancery Division*, 351.]

COTTON, L. J.[1] This is an appeal by the plaintiff from a decision of Mr. Justice Kekewich dismissing an action brought against Uppleby, a retired trustee of the will of Eliza Salmon, to make him responsible for an improper investment.

There are two questions to be considered. The first is, whether the investment in question was wrongful. It was within the terms of the trust, for it was an investment on mortgage of a freehold estate. In one sense, therefore, it was in accordance with the trusts, and if the trustee took due care as to its sufficiency there would be no breach of trust, and nobody could complain, though it ultimately proved insufficient. The case differs from that of an investment not within the terms of the instrument, which is necessarily a breach of trust, so that if any loss occurs the trustees must be liable for it. The question here is, whether Uppleby took proper care in seeing to the sufficiency of the security.

Now as regards the rule which has been so much discussed, as to the amount which may be lent on a given security, the law is thus summed-up in Learoyd *v.* Whiteley[2]: "As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply. The courts of equity in England have indicated and given effect to certain general principles for the guidance of trustees in lending money upon the security of real estate. Thus it has been laid down that in the case of ordinary agricultural land the margin ought not to be less than one-third of its value; whereas in cases where the

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savings bank in this State, or in the bonds or loans of this State, of some town, city, or county of this State, or of the United States, and in no other way."

Tennessee Code (1884), § 4413. Trustees are authorized to invest in the "public stocks or bonds of the United States, and make report to the county court . . . unless another mode of investment is required" by the creator of the trust. — ED.

[1] Only the opinion of Cotton, L. J., upon the propriety of the investment is given. — ED.

[2] 12 App. Cas. 727, 733.

subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think these have been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept."[1] These rules are there recognized, though they have been impeached by Mr. Warmington and Mr. Wood. In the present case the value of the property was mainly derived from buildings. I do not think that the valuation of the property has been successfully impeached. We must take the property as having been worth £1750. The trustees lent £1300 upon it. Now, we must have regard not only to the value, but to the nature of the property. It consisted of small houses let at weekly rents, and we know the class of tenants likely to be attracted by cottage property in Hull. It was certainly not prudent to lend to this extent upon property the value of which depended on laborers' houses being wanted in that part of Hull. The investment, therefore, was a breach of trust as having been made improvidently.[2]

ARNOULD *v.* GRINSTEAD.

IN CHANCERY, BEFORE SIR JAMES BACON, V. C., NOVEMBER 25, 1872.

[*Reported in Weekly Notes* (1872), 216.]

EDWARD STANLEY, by his will, dated the 15th of January, 1861, directed that "all my personal property invested in government or other securities, in bonds or shares, of whatever nature and kind, be held in the same or the like investments, by and in the name of my wife, Catherine Stanley, my son, R. R. P. Stanley, and G. Burrows, M. D., whom I appoint to be my executrix and executors," upon trusts for the benefit of his daughters and their children.

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[1] Godfrey *v.* Faulkner, 23 Ch. D. 483; *Re* Pearson, 51 L. T. Rep. 692; *Re* Blauvelt, 20 N. Y. Sup. 119 *Accord.* — ED.

[2] For want of a sufficient margin investments upon mortgage were adjudged improper in the following cases: Stickney *v.* Sewell, 1 M. & Cr. 8; Norris *v.* Wright, 14 Beav. 291; Macleod *v.* Annesley, 16 Beav. 600; Stretton *v.* Ashmall, 3 Drew. 9; Ingle *v.* Partridge, 34 Beav. 411; Budge *v.* Gummow, 7 Ch. 719; Hoey *v.* Green, W. N. (1884) 236; Fry *v.* Tapson, 28 Ch. D. 268; Smethurst *v.* Hastings, 30 Ch. D. 490; Walcott *v.* Lyons, 54 L. T. Rep. 786; *Re* Olive, 34 Ch. D. 70; Learoyd *v.* Whiteley, 12 App. Cas. 727, 33 Ch. Div. 247, 32 Ch. D. 196; *Re* Partington, 57 L. T. Rep. 654; Knox *v.* Mackinnon, 13 App. Cas. 753; Rae *v.* Meek, 14 App. Cas. 558; *In re* Somerset, '94, 1 Ch. 231; Cardwell, 55 Cal. 137; Craven's case, 43 N. J. Eq. 416; Bogart *v.* Jackson, 4 Edw. 718; *Re* Blauvelt, 20 N. Y. Sup. 119; Girard Co's. Ap., 13 W. N. C. (Pa.) 367; Lechler's App., 21 W. N. C. (Pa.) 505.

See also Trustee Act, 1888, § 4, and Trustee Act, 1893, § 8. — ED.

The personal property of the testator was invested in Victoria Government Bonds, Brazilian and Russian Bonds, Indian and English Railway Stock, East India Stock, and the new 3 per cents; these investments having been made by the testator himself.

The question was, whether the trustees were justified in retaining the trust funds upon these investments.

Amphlett, Q. C., and *Naldon*, for the plaintiffs, the trustees.

Eddie, Q. C., and *E. Cutler*, for Mr. and Mrs. Grinstead, tenants for life of the fund.

Swanston, Q. C., and *W. R. Fisher*, for persons intrusted in remainder, contended that the securities, most of which were payable to bearer, were unauthorized and unsafe (no one being legally responsible for their custody), and that the trustees were bound to convert them into 3 per cents, or show some investment of equal security.

The VICE CHANCELLOR said that the securities on which the trust funds were invested could not be altered without violating the plain and positive direction of the will, and accordingly held that the investments were proper investments, and within the meaning of the will.[1]

BROWN v. GELLATLY.

IN CHANCERY, BEFORE LORD CAIRNS, L. J., AUGUST 5, 1867.

[*Reported in Law Reporter*, 2 *Chancery Appeals*, 751.]

THIS was an appeal from the Master of the Rolls.

Duncan Dunbar, by his will, dated the 13th July, 1859, left all his property, personal or freehold, of whatever description, in trust, to William Smith Brown and Edward Gellatly, giving them full power, except as thereinafter provided, to realize the same when and in such manner as they might see fit without being personally responsible for such realization, and "to sail my ships for the benefit of my estate until they can be satisfactorily sold without being responsible for any loss on any voyage." The testator bequeathed various legacies upon various trusts; and he bequeathed the residue of his estate in certain shares to tenants for life and remaindermen, and he gave to his executors "full power to invest at their discretion, or allow to remain as at present invested, all my funds in Government and Colonial Government Securities, Guaranteed Railway Stock and Debentures, East India Bonds and Stock, Marine Insurance Shares, and Shares in the London Chartered Bank.

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[1] Forbes v. Rose, 2 Bro. C. C. 430, 2 Cox, 113 s. c.; Robinson v. Robinson, 1 D. M. & G. 247; Paddon v. Robinson, 7 D. M. & G. 563; Consterdine v. Consterdine, 31 Beav. 330; Pickard v. Anderson, 13 Eq. 608 *Accord.*

When there is a direction or duty to convert the trust fund into new securities, the conversion must be made within a reasonable time, which, as a rule, means within one year. The trustee was held liable for unreasonable delay in Bate v. Hooper, 5 D. M. & G. 338; Hughes v. Simpson, 22 Beav. 181; Grayburn v. Clarkson, 3 Ch. 605; Sculthorpe v. Tipper, 13 Eq. 232; Gainsborough v. Watcombe Co., 54 L. J. Ch. 991; Heirs Hiddingh v. Hiddingh, 12 Ap. Cas. 624. If, however, the condition of the market is such as to justify delay, the trustee who acts in good faith will not be charged, if he does not effect the conversion within a year. Buxton v. Buxton, 1 M. & Cr. 80; Marsden v. Kent, 5 Ch. Div. 598. — ED.

The testator was a large shipowner, and at the time of his death he was possessed of ships to the value of upwards of £300,000. A large part of his estate also consisted of shares in public companies and the bonds of colonial governments. Some of these investments came within the terms of the above clause, authorizing the executors to allow them to remain in their then state of investment, and others were not comprised in the terms of that clause.

A question arose whether the tenants for life of the residue were entitled to the profits of the testator's ships until sale as income of the residue, or whether those profits were to be treated as capital. A similar question arose with respect to the income of the other securities upon which the testator's property was invested.[1]

Lord Cairns, L. J. There are three questions in the case: the first, as to the ships; the second, as to what I will term the authorized securities; and the third, as to the securities which are not authorized by the will.

With regard to the ships, I think that the case of Green *v.* Britten,[2] does not apply. In Green *v.* Britten there was an absolute prohibition against converting the ships for seven years, except in an event which did not happen, and the court, resting upon the prohibition, held that it was a sufficient warrant for giving to the tenant for life the income which those ships earned during the seven years. It is not necessary here to consider whether that was a correct construction or not; it is enough to say that the principle on which the court proceeded does not apply to the present case, in which we find no indication whatever of an intention that the ships were to remain unconverted for any specific time. The testator, who had been engaged in the shipping business, knew perfectly well, and shows that he knew, that some time would necessarily be taken in converting the ships, and therefore he very wisely provided that until they were sold the executors should have a power which otherwise they would not have possessed, namely, the power to sail the ships for the purpose of making profit, but in giving that power, he does not give it as a power to be exercised for the benefit of the tenant for life as against the parties in remainder, or for the benefit of the parties in remainder as against the interest of the tenant for life, but says that it is to be exercised for the benefit of the estate, meaning, as I apprehend, for the benefit of the estate generally, without disarranging the equities between the successive takers.

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[1] The statement of facts is taken from 15 W. R. 1188. The arguments of counsel are omitted. — Ed.

[2] 1 D. J. & S. 649.

I think, therefore, that with regard to the ships, the testator put them simply in the position of property which was to be converted cautiously, and in proper time, and as to which there was no breach of trust in the executors delaying to convert it, but which, when converted, was to be invested, and when invested, to be enjoyed as the residue of his estate.

In that state of things, it seems to me that the case falls exactly within the third division pointed out by Sir James Parker in the case of Meyer *v.* Simonsen,[1] and that a value must be set upon the ships as at the death of the testator, and the tenant for life must have 4 per cent on such value, and the residue of the profits must of course be invested, and become part of the estate.[2]

Then, secondly, as to the authorized securities. By those, I mean the securities which are specified in the last clause of the will, Government and Colonial Government Securities, Guaranteed Railway Stock and Debentures, East India Bonds and Stock, Marine Insurance Shares, and Shares in the London Chartered Bank. The first thirteen items in the list of securities contained in the statement submitted to the Master of the Rolls, are admitted to come under one or other of those descriptions. In my opinion, according to the construction of the will, the executors have full power to retain upon those securities, for as long as they think it advantageous, the money invested by the testator in those securities, or to invest upon securities of any of those descriptions the money obtained by the conversion of any part of the testator's estate, and while any such securities form part of the testator's estate the tenant for life is, in my opinion, entitled to the specific income of the securities, just as if they had been £3 per cent consols.[1] I understand the words of the will as amounting to the constitution by the testator of a larger class of authorized securities than this court itself would have approved of, and the court has merely to follow his directions, and treat the income accordingly, as being the income of authorized securities.

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[1] 5 De G. & Sm. 723.

[2] Taylor *v.* Clark, 1 Hare, 161; Meyer *v.* Simonsen, 5 De G. & Sm. 723; *Re* Lewellyn 29 Beav. 171; Hemenway *v.* Hemenway, 134 Mass. 446, 451; Mudge *v.* Parker, 139 Mass. 153 *Accord.*

In accordance with what is called the rule in Howe *v.* Earl of Dartmouth, if there is a gift of one's personal estate or of the residue thereof, to be enjoyed by persons in succession, it is the duty of the trustees to convert so much of the property as is of a wasting or perishable nature into permanent securities approved by the court. A conversion was deemed essential in Powell *v.* Cleaver, 7 Ves. 142 n. (96); Cranch *v.* Cranch, 7 Ves. 141 n. (95); Howe *v.* Dartmouth, 7 Ves. 72; Fearns *v.* Young. 9 Ves. 549; Lichfield *v.* Baker, 2 Beav. 487; Caldecott *v.* Caldecott, 1 Y. & C. C. C. 312; Benn *v.* Dixon, 10 Sim. 636; Sutherland *v.* Cooke, 1 Coll. 498; Johnson *v.* Johnson, 2 Coll. 441; Pickup *v.* Atkinson, 4 Hare, 624; Morgan *v.* Morgan, 14 Beav. 72; Craig *v.* Wheeler, 29 L. J. Ch. 374; *Re* Lewellyn, 29 Beav. 171; Pidgeon *v.* Spencer, 16 L. T. Rep. 83; *In re* Shaw, 12 Eq. 124; Tickner *v.* Old, 18 Eq. 422; Porter *v.* Baddeley, 5 Ch. D. 542; Macdonald *v.* Irvine, 8 Ch. D. 101; *In re* Smith, 48 L. J. Ch. 205; Kinmonth *v.* Brigham, 5 All. 770; Minot *v.* Thompson, 106 Mass. 583; Covenhoven *v.* Shuler, 2 Paige, 122; Williamson *v.* Williamson, 6 Paige, 298; Cairns *v.* Chaubert, 9 Paige, 160; Spear *v.* Tinkham, 2 Barb. Ch. 211; Smith *v.* Barham, 2 Dev. Eq. 420; Jones *v.* Simmons, 7 Ired. Eq. 178; Saunders *v.* Haughton, 8 Ired. Eq. 217.

But effect will of course be given to an intention, to be gathered from the language of the giver, that the property should be enjoyed *in specie*. A large number of cases in which the court refused to direct a conversion may be found in Lewin, Trusts, (9th Ed.) 319. — ED.

Then comes the third question in the case, the securities not ranging themselves under any of those mentioned in the last clause of the will. They appear to have been securities possessed by the testator himself, but that, I think, makes no difference; as they do not come within the class of authorized securities it was the duty of the trustees to convert them at the earliest moment at which they properly could be converted.[2] I do not mean to say that the trustees were by any means open to censure for not having converted them within the year, but I think that the rights of the parties must be regulated as if they had been so converted. I think the proper order to make is that which was made in Dimes *v.* Scott,[3] followed by Vice-Chancellor Wigram in the case of Taylor *v.* Clark,[4] namely, to treat the tenant for life as entitled, during the year after the testator's death, to the dividends upon so much 3 per cent stock as would have been produced by the conversion and investment of the property at the end of the year. This will involve a variation of the order under appeal as to those securities, since it proceeds upon a somewhat different footing, and aggregates the amount produced by conversion at the end of the year with the dividends produced during the year, which is not precisely in accordance with Dimes *v.* Scott, and Taylor *v.* Clark.[5]

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[1] Wrey *v.* Smith, 14 Sim. 202; Mackie *v.* Mackie, 5 Hare, 70; Sparling *v.* Parker, 9 Beav. 524; Hubbard *v.* Young, 10 Beav. 203; Johnston *v.* Moore, 27 L. J. Ch. 453; Green *v.* Britten, 1 D. J. & S. 649; *In re* Chancellor, 26 Ch. Div. 482; *In re* Sheldon, 39 Ch. D. 50; *In re* Thomas, '91, 3 Ch. 482; Hemenway *v.* Hemenway, 134 Mass. 446 *Accord.* — Ed.

[2] Kirkman *v.* Booth, 11 Beav. 273; Thornton *v.* Ellis, 15 Beav. 193; Blann *v.* Bell, 2 D. M. & G. 775, 5 De G. Sm. 658; Hood *v.* Clapham, 19 Beav. 90; Wightwick *v.* Lord, 6 H. L. C. 217, 228 (*semble*); *Re* Hill, 50 L. J. Ch. 551; Kinmonth *v.* Brigham, 5 All. 270; Ashurst *v.* Potter, 29 N. J. Eq. 625, 632 *Accord.* — Ed.

[3] 4 Russ. 195.

[4] 1 Hare, 161.

[5] See, in further confirmation of Dimes *v.* Scott, Morgan *v.* Morgan, 14 Beav. 72; Holgate *v.* Jennings, 24 Beav. 623; *Re* Lewellyn, 29 Beav. 171; Hume *v.* Richardson, 4 D. F. & J. 29; Allhusen *v.* Whittell, 4 Eq. 295. — Ed.

LOWSON *v.* COPELAND.

IN CHANCERY BEFORE LORD THURLOW, C., MARCH 17, 1787.

[*Reported in* 2 *Brown, Chancery Cases*, 156.]

ANN BARBER made her will in 1765, and thereby gave the defendant an annuity of three pounds per annum for his trouble in receiving several rents of her real estate, and appointed him executor, making no disposition of the residue of her estate. In 1770, the plaintiffs filed their bill as next of kin of the testatrix, insisting that the gift of the annuity had turned the defendant into a trustee for them as to the undisposed surplus, and praying an account of all sums he had received, or might have received. The defendant, by his answer, contested the plaintiffs being next of kin, and put them to the proof of their relationship; and, in case they were such, controverted his being turned into a trustee for them. The cause was heard before his late Honor in 1773, who decreed that the defendant was a trustee for the next of kin, and referred it to the Master to inquire whether the plaintiffs were the next of kin, and to take an account. In 1783 the Master made his report that the plaintiffs were the next of kin; and, among other things, stated a bond, bearing date the 1st of May, 1761, by one Lumley, to the testatrix, for one hundred pounds, with which the Master charged the defendant. To this report the defendant excepted, for that the Master had charged him with the £100 as received from Lumley, whereas he had not received it, although he had made various applications, and used due diligence to obtain payment of it. This exception coming on before the Lords Commissioners, they referred it to the Master to inquire whether the executor had taken proper steps for the recovery of the money, and whether the debt was a good debt, and ordered the defendant to call in the bond. The Master reported, that the defendant had applied by an attorney to the obligor in the bond, to pay the debt, but had brought no action, or made any other application; and that it did not appear whether the debt was or was not recoverable.

It now came on again upon further directions.

Mr. Ambler and *Mr. Scott* (for the defendant) insisted that the report did not charge the defendant with such a neglect as ought to make him personally liable to answer the £100 not got in from the bond debt; that the defendant had made many applications to the obligor; and although he had not brought any action, that arose only from the fear of an useless expense. That the Master had reported it a doubtful debt, and the plaintiffs had never called upon him to bring any action; and he was the rather induced not to do so, as he considered himself as acting upon his own money, having no idea that the annuity of £3 per annum had turned him into a trustee; cases having been determined, that where a legacy is not given in such a way as to exclude the intention of giving the whole, it has been held not to turn the executor into a trustee, which he had been advised was the case with this annuity.

But LORD CHANCELLOR ordered that he should be liable for this £100 as having not been got in in consequence of his neglect.[1]

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[1] Powell *v.* Evans, 5 Ves. 839; Caffrey *v.* Darby, 6 Ves. 488; Tebbs *v.* Carpenter, 1 Mad. 290; Mucklow *v.* Fuller, Jac. 198; Platel *v.* Cradock, C. P. Cooper, 481; Clough *v.* Bond, 3 M. & Cr. 490, 496; Caney *v.* Bond, 6 Beav. 486; Bullock *v.* Wheatley, 1 Coll. 130; Fenwick *v.* Greenwell, 10 Beav. 412; Styles *v.* Guy, 1 Mac. & G. 422; Byrne *v.* Norcott, 13 Beav. 336; McGachen *v.* Dew, 15 Beav. 84; Wiles *v.* Gresham, 2 Drew. 258; Brittlebank *v.* Goodwin, 5 Eq. 545, 550; *Re* Brogden, 38 Ch. Div. 546; *In re* Tucker, '94, 1 Ch. 724; Duffee *v.* Buchanan, 8 Ala. 27; Royall *v.* McKenzie, 25 Ala. 363; Oglesby *v.* Howard, 43 Ala. 144; Munden *v.* Bailey, 70 Ala. 63; Sanderson *v.* Sanderson, 20 Fla. 292; Whitney *v.* Peddicord, 63 Ill. 249; Waterman *v.* Alden, 144 Ill. 90; Simpson *v.* Gowdy, 19 Ind. 292; State *v.* Gregory, 88 Ind. 110; Cross *v.* Petree, 10 B. Mon. 413; Hunt *v.* Gontrum (Md. '94), 30 Atl. R. 620; Banks *v.* Machen, 40 Miss. 256; Kincheloe *v.* Priest, 89 Mo. 240; Booker *v.* Armstrong, 93 Mo. 49; Schultz *v.* Pulver, 11 Wend. 361, 3 Paige, 182; Holcomb *v.* Coryell, 11 N. J. Eq. 477; Poulson *v.* Johnson, 29 N. J. Eq. 529; Speakman *v.* Tatem, 48 N. J. Eq. 137, 50 N. J. Eq. 484; Cooley *v.* Vansyckle, 14 N. J. Eq. 496; Mills *v.* Hoffman, 26 Hun, 594; O'Connor *v.* Gifford, 6 Dem. 71; Harrington *v.* Keteltas, 92 N. Y. 40; Wilson *v.* Lineberger, 88 N. Ca. 416; Long's Est., 6 Watts, 46; Johnston's Est., 9 W. & S. 107; Beckley's App., 3 Barr, 425; Will's App., 22 Pa. 330; Charlton's App., 34 Pa. 473; Sheffer's App., 46 Pa. 131; *Re* Strong's Est., 160 Pa. 13 (but see Keller's App., 8 Pa. 288); Gates *v.* Whetstone, 8 S. Ca. 244; Perry *v.* Wooton, 5 Humph. 524 (see James *v.* Wingo, 7 Lea (Tenn.), 148; Holmes *v.* Bridgman, 37 Vt. 28; McCloskey *v.* Gleason, 56 Vt. 264; Rowe *v.* Bentley, 29 Grat. 756.

In the principal case it did not appear whether the debt might have been recovered by the exercise of due diligence by the trustee. But the latter was properly charged with the full amount of the debt. For, as Mr. Justice Lindley clearly states the law, "When the *cestui que trust* has shown that the trustee has made default in the performance of his duty, and when the money which was the subject of the trust is not forthcoming, the *cestui que trust* has made out, in my judgment, a *prima facie* case of liability upon the trustee, and if the trustee desire to repel that by saying that if he had done his duty no good would have flowed from it, the burden of sustaining that argument is plainly upon the trustee." *Re* Brogden, 38 Ch. Div. 546, 572. See to the same effect Maitland *v.* Bateman, 16 Sim. 233, n.; Edmunds *v.* Peake, 7 Beav. 239; East *v.* East, 5 Hare, 343; Clark *v.* Holland, 19 Beav. 262, 271; Grove *v.* Price, 26 Beav. 103; Hobday *v.* Peters, 28 Beav. 603; *Re* Hurst, 63 L. T. Rep. 665, 668; Ball *v.* Ball, 11 Ir. Eq. 370; Alexander *v.* Alexander, 12 Ir. Ch. 1; *Re* Sanderson, 74 Cal. 199; Sherrell *v.* Shepard, 19 Fla. 300; Williams *v.* Pettigrew, 62 Mo. 471; Julian *v.* Abbott, 73 Mo. 580; Powell *v.* Hunt, 108 Mo. 507; Mitchell *v.* Trotter, 7 Grat. 136; Lovett *v.* Thomas, 81 Va. 245.

Similarly a trustee may defeat a *prima facie* case against himself by showing that more was probably to be realized on the claim by indulgence to the debtor for a time than by summary legal proceedings. Walker *v.* Symonds, 3 Sw. 1, 71; Ratcliffe *v.* Winch, 17 Beav. 217; *In re* Earl, 39 W. R. 107; Waring *v.* Waring, 10 Gill & J. 127; Torrence *v.* Davidson, 92 N. Ca. 437; Neff's App., 57 Pa. 91; Dabney's App., 120 Pa. 345; Tanner *v.* Bennett, 33 Grat. 251.

COMPROMISE. — To justify a compromise of a claim by a trustee, the latter must shew that it was a reasonable settlement of a claim which in all probability could not have been collected in full. Blue *v.* Marshall, 3 P. Wms. 381; Pennington *v.* Healey, 1 Cr. & M. 402; Wiles *v.* Gresham, 5 D. M. & G. 770; Moulton *v.* Holmes, 57 Cal. 337; Siddall *v.* Clark, 89 Cal. 321, 323; Fridge *v.* Buhler, 6 La. An. 274; Berry *v.* Parkes, *Mr. Lloyd* (for the plaintiffs) pressed that he might pay interest for the money admitted by the account to be in his hands, and all costs.

LORD CHANCELLOR refused charging him with interest,[1] but ordered him to pay the costs of establishing the next of kin.

ROBINSON *v.* ROBINSON.

IN CHANCERY, BEFORE LORD CRANWORTH AND SIR J. L. KNIGHT BRUCE, L.JJ., DECEMBER 22, 1851.

[*Reported in* 1 *De Gex, Macnaghten and Gordon,* 247.]

LORD CRANWORTH, L. J.[2] In the present case it will be observed the executors had the option of investing the trust money at their discretion on real or government securities, and in such a case Sir J. Leach held, in the case of Marsh *v.* Hunter,[3] that trustees, by whose default the money is lost, are chargeable, not with the amount of stock which might have been purchased, but only with the principal money lost, and of course, though the report is not so expressed, with interest thereon.

That decision occurred in 1822. Four years later, namely, in 1826, occurred the case of Hockley *v.* Bantock,[4] before Lord Gifford. There the executors had a similar discretion of investing either on real or government securities; and, on a bill seeking to charge them with balances improperly retained in their hands, Lord Gifford directed

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11 Miss. 625; Long *v.* Shackleford, 25 Miss. 559, 566; Wyman's App. 13 N. H. 18; *In re* Scott, 1 Redf. 234, 236; Chouteau *v.* Suydam, 21 N. Y. 179; Bacot *v.* Heyward, 5 S. Ca. 441; Pool *v.* Dial, 10 S. Ca. 440; Alexander *v.* Kelso, 59 Tenn. 311; Boyd *v.* Oglesby, 23 Grat. 674.

A trustee taking payment in Confederate money in the Southern States during the late war, when it was the currency of those States, should be protected, it has been said, if he acted honestly. Campbell *v.* Miller, 38 Ga. 304; Westbrook *v.* Davis, 48 Ga. 471; Venable *v.* Cody, 68 Ga. 171; Davis *v.* Harman, 21 Grat. 194.

It is not the duty of a trustee to bring an action to collect a claim when there is no reasonable ground for believing that anything can be realized thereby. Bown *v.* Montgomery, 48 Ala. 353; Pool's Case, 14 La. An. 677; Smith *v.* Collemer, 2 Dem. 147; Mitchell *v.* Trotter, 7 Grat. 136; Anderson *v.* Piercy, 20 W. Va. 282, 327. Unless he is indemnified as to the costs of the action. Griswold *v.* Chandler, 5 N. H. 492; Sanborn *v.* Goodhue, 28 N. H. 48; Hepburn *v.* Hepburn, 2 Bradf. 74; Utley *v.* Rawlins, 2 Dev. & B. Eq. 438. — ED.

[1] Tebbs *v.* Carpenter, 1 Madd. 290, 299; Pulliam *v.* Pulliam, 10 F. R. 53 *Accord.*

But see *contra, Ex parte* Ogle, 8 Ch. 711, 716; Eppinger *v.* Canepa, 20 Fla. 262, 288; Scott *v.* Crews, 72 Mo. 261; Torbet *v.* McReynolds, 4 Humph. 215; Lowry *v.* McGee, 3 Head, 269. — ED.

[2] Only a portion of Lord Cranworth's opinion is given. — ED.

[3] 6 Madd. 295.

[4] 1 Russ. 141.

an inquiry as to the price of £3 per cents at the several times when the balances ought to have been invested. Such an inquiry would have been improper if the executors could not have been charged with the value of the stock; and the case, therefore, is an authority that, in the opinion of Lord Gifford, they might be so charged. Notwithstanding this last case, however, Sir J. Leach adhered to his own view of the law, and acted on it in an unreported case of Gale *v.* Pitt at the Rolls on the 10th of May, 1830.

Lord Gifford's authority had been followed by Lord Langdale in several reported cases, to which we were referred in the argument; namely, Watts *v.* Girdlestone,[1] Ames *v.* Parkinson,[2] and Ouseley *v.* Anstruther.[3]

On the other hand Sir James Wigram, in Shepherd *v.* Mouls,[4] and my learned brother in Rees *v.* Williams,[5] have refused to follow the authority of Hockley *v.* Bantock,[6] and have acted on the earlier case of Marsh *v.* Hunter.[7] In this irreconcilable conflict of authority, it is absolutely necessary for us to look to the principles on which the doctrine rests.

There can be no doubt but that, where trustees improperly retain balances in their hands, or, by want of due care, cause or permit trust money to be lost, they are chargeable with the sums so retained or lost, and with interest on them at £4 per cent.[8]

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[1] 6 Beav. 188.
[2] 7 Beav. 379.
[3] 10 Beav. 456
[4] 4 Hare, 500.
[5] 1 De G. & S. 314.
[6] 1 Russ. 141.
[7] 6 Madd. 295.

[8] *Negligence.* — Hicks *v.* Hicks, 3 Atk. 274; Rocke *v.* Hart, 11 Ves. 58; Ashburnham *v.* Taylor, 13 Ves. 402; Tebbs *v.* Carpenter, 1 Mad. 290; Holgate *v.* Haworth, 17 Beav. 259; Johnson *v.* Prendergast, 28 Beav. 480; *In re* Evans, W. N. (1876), 205; Gilbert *v.* Price, W. N. (1878), 117. See also Gilroy *v.* Stevens, 51 L. J. Ch. 834 (3 per cent compound interest); Clapp *v.* Woodall, 38 Sol. J. 487 (3 per cent) *Accord.*

Active Misconduct. — If the trustee is guilty of active misconduct, as distinguished from negligence, he is liable in England for interest at five per cent. Piety *v.* Stace, 4 Ves. 620; Pocock *v.* Redington, 5 Ves. 794; Tebbs *v.* Carpenter, 1 Mad. 290, 306 (*semble*); Crackelt *v.* Bethune, 1 J. & W. 586; Bick *v.* Motley, 2 M. & K. 312; Munch *v.* Cockerell, 5 M. & Cr. 178, 220; Mousley *v.* Carr, 4 Beav. 49, 53; Mayor *v.* Murray, 7 D. M. & G. 497; Burdick *v.* Garrick, 5 Ch. 233; *Ex parte* Ogle, 8 Ch. 711; Hooper *v.* Hooper, W. N. (1874), 174; Price *v.* Price, 42 L. T. Rep. 626; *Re* Jones, 49 L. T. Rep. 91.

But see Newton *v.* Bennet, 1 Bro. C. C. 358; Perkins *v.* Baynton, 1 Bro. C. C. 375; *In re* Hilliard, 1 Ves. Jr. 90; Browne *v.* Southouse, 3 Bro. C. C. 107; Younge *v.* Combe, 4 Ves. 101; Dawson *v.* Massey, 1 Ba. & Be. 218; Attorney-General *v.* Alford, 4 D. M. & G. 843; *In re* Emmet, 17 Ch. D. 142; Fletcher *v.* Green, 33 Beav. 426; Vyse *v.* Foster, 8 Ch. 309, 337 (*semble*), (in which cases the misconducting trustee was charged with only 4 per cent interest).

Originally an executor, who used for himself the funds of the estate in his charge, was not liable for any interest. Grosvenor *v.* Cartwright (1679), 2 Ch. Ca. 21; Linch *v.* Cappy (1680), 2 Ch. Ca. 35; Bromfield *v.* Wytherly (1718), Prec. Ch. 505. But these cases were overruled in Ratcliffe *v.* Graves, 1 Vern. 196, 2 Ch. Ca. 152, s. c., and Corsellis *v.* Lake, 1 Vern. 197 n. (1). See also Child *v.* Gibson, 2 Atk. 603; Adams *v.* Gale, 2 Atk. 106.

In this country the distinction between negligence and active misconduct has not generally prevailed. In each case the trustee is charged with simple interest at the

It may also be true that, where trustees have in their hands money which they are bound to secure permanently for the benefit of their *cestuis que trustent*, then, in the absence of express authority or direction to the contrary, they are generally bound to invest the money in the £3 per cents. This obligation is not the result of any positive law, but has been imposed on trustees by the court as a convenient rule affording security to the *cestuis que trustent*, and presenting no possible difficulty to the trustees.

Suppose, then, that trustees have improperly retained in their hands balances which they ought to have invested in £3 per cents, either by reason of this general rule of the court, or because such a duty was expressly imposed on them by the terms of the trust, or have by neglect allowed such balances to be lost, what, in such a case, is the right of the *cestuis que trustent ?*

In all such cases, or at all events in all such cases where there has

legal rate. *In re* Thorp (U. S. D. C.), 4 N. Y. Leg. Obs. 377; Bourne *v.* Maybin, 3 Woods, C. C. 724; Bryant *v.* Craig, 12 Ala. 354; Nunn *v.* Nunn, 66 Ala. 35; Eppinger *v.* Canepa, 20 Fla. 262; Hough *v.* Harvey, 71 Ill. 72; Lehman *v.* Rothbarth, 111 Ill. 185; Rochester *v.* Levering, 104 Ind. 562; Hughes *v.* Smith, 2 Dana, 251; Grigsby *v.* Wilkinson, 9 Bush, 96; Ringgold *v.* Ringgold, 1 Har. & G. 11; Comegys *v.* State, 10 Gill & J. 175; Smith *v.* Darby, 39 Md. 268; Gott *v.* State, 44 Md. 319; McKim *v.* Hibbard, 142 Mass. 422; Moyer *v.* Fletcher, 56 Mich. 508; Judd *v.* Dike, 30 Minn. 380; Crosby *v.* Merriam, 31 Minn. 342; Ames *v.* Scudder, 83 Mo. 189, 11 Mo. Ap. 168; Knowlton *v.* Bradley, 17 N. H. 458; Stark *v.* Gamble, 43 N. H. 465; Bartlett *v.* Fitz, 59 N. H. 502, 503; Aldridge *v.* McClelland, 36 N. J. Eq. 288; Demarest *v.* Demarest, 1 Johns. Ch. 508; Manning *v.* Manning, 1 Johns. Ch. 525; De Peyster, App. 2 Wend. 77; Utica Co. *v.* Lynch, 11 Paige, 520; Garniss *v.* Gardiner, 1 Edw. 130; Thorn *v.* Garner, 42 Hun, 507; Lant *v.* Howard, 89 N. Y. 169; Cook *v.* Lowry, 95 N. Y. 103; *Re* Myers, 131 N. Y. 409 (But see Wilmerding *v.* McKesson, 103 N. Y. 329); Morgan *v.* Morgan, 4 Dem. 353; *In re* Barnes, 23 N. Y. Sup. 600; Shipp *v.* Hettrick, 63 N. Ca. 329; Armstrong *v.* Miller, 6 Oh. 118; *In re* McCall 1 Ashm. 357; Fox *v.* Wilcocks, 1 Binn. 194; Say *v.* Barnes, 4 S. & R. 112; Lane's App., 24 Pa. 487; Landis *v.* Scott, 32 Pa. 495; Pennypacker's Ap., 41 Pa. 494; Ihmsen's Ap., 43 Pa. 431; Hess's Est., 68 Pa. 454; Conrad's App., 11 W. N. (Pa.) 521; Whitecar's Est., 147 Pa. 368; Black *v.* Blakely, 2 McC. Ch. 1, 10; Wright *v.* Wright, 2 McC. Ch. 185; Turney *v.* Williams, 7 Yerg. 173, 213; Cannon *v.* Apperson, 14 Lea, 553; Murchison *v.* Payne, 37 Tex. 305; Reed *v.* Timmins, 52 Tex. 84; McCloskey *v.* Gleason, 56 Vt. 264; Miller *v.* Beverley, 4 Hen. & M. 415; Cavendish *v.* Fleming, 3 Munf. 198; Ker *v.* Snead, 11 Monthly L. Rep. 217; Cogbill *v.* Bird, 79 Va. 1; *In re* Thurston, 57 Wis. 104. In Schofield's Est., 99 Ill. 513, it was decided that a trustee who mixed the trust fund with his own was not, merely on that account, liable for interest so long as he remained solvent, but this doctrine is deservedly without support elsewhere.

In Wilmerding *v.* McKesson, 103 N. Y. 329, the English doctrine of allowing equitable interest, *i. e.*, interest below the legal rate, where the breach of trust involves no moral delinquency, is followed.

Innocent Misapplication of Trust Fund.—It has been thought that a fiduciary, who has acted under a misapprehension of rights, and without profit to himself, should not be charged with any interest, even though in fact he misapplied the trust fund. Saltmarsh *v.* Barrett, 31 Beav. 349; Pulliam *v.* Pulliam, 10 F. R. 53. But this opinion is at variance with the authorities generally. Mousley *v.* Carr, 4 Beav. 49; Atty-Gen. *v.* Koehler, 9 H. L. C. 654; Inglis *v.* Beaty, 2 Ont. Ap. 453; *In re* Hulkes, 33 Ch. D. 552; Moody *v.* Hemphill, 71 Ala. 169; Crowder *v.* Shackleford, 35 Miss. 321; Jones *v.* Ward, 10 Yerg. 160.

been an express trust to invest in £3 per cents, the *cestuis que trustent* have the option of charging the trustee either with the principal sum retained and interest, or with the amount of £3 per cents which would have arisen from the investment if properly made.[1] The doctrine of the court where it applies this rule is, that the trustee shall not profit by his own wrong. If he had done what he was bound to do, a certain amount of £3 per cents would have been forthcoming for the *cestuis que trustent*. And therefore if called on to have such £3 per cents forthcoming, he is bound to do so; just as, in ordinary cases, every wrong-doer is bound to put the party injured, so far as the nature of the case allows, in the same situation in which he would have stood if the wrong had not been done. All this is very intelligible.[2]

Again, suppose the trustee has not only improperly retained balances, but has lent or used them in trade. There the *cestui que trust* has the right, if it is for his interest to do so, to charge the trustee not with the sum retained and interest, but with all the profits made in the trade.[3]

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[1] Bate *v.* Hooper, 5 D. M. & G. 338; Pride *v.* Fooks, 2 Beav. 430; *Re* Lasak, 20 N. Y. Sup. 74 *Accord.*

If a trustee improperly sells the trust securities and they rise in value he is accountable for the appreciation. Piety *v.* Stace, 4 Ves. 620, 622. — Ed.

[2] See Barney *v.* Saunders, 16 How. (U. S.) 535.

[3] Anon, 2 Ves. 630; Burden *v.* Burden, 1 J. & W. 134 (*cited*); Palmer *v.* Mitchell, 2 M. & K. 672, n.; Docker *v.* Somes, 2 M. & K. 655; Willett *v.* Blanford, 1 Hare, 253; Wedderburn *v.* Wedderburn, 22 Beav. 84; Townend *v.* Townend, 1 Giff. 201; Flockton *v.* Bunning, 8 Ch. 323, n.; Barney *v.* Saunders, 16 How. 535; Whitney *v.* Peddicord, 63 Ill. 249; Ringgold *v.* Ringgold, 1 Har. & G. 11, 79, 80; Heath *v.* Waters, 40 Mich. 457; McKnight *v.* Walsh, 23 N. J. Eq. 136, 24 N. J. Eq. 498; Schieffelin *v.* Stewart, 1 Johns. Ch. 620; Robinett's Ap., 36 Pa. 174; Norris's Ap., 71 Pa. 106; Hazard *v.* Durant, 14 R. I. 25 *Accord.*

In determining the profits made by a trustee the whole period during which he has had charge of the fund must be considered. The beneficiary cannot take profits for a part of the time and interest for the rest of the time. Baker *v.* Disbrow, 18 Hun, 29.

Compound Interest. — It was not formerly customary to allow compound interest against a trustee simply because he invested the trust funds in trade. Treves *v.* Townshend, 1 Bro. C. C. 384, 1 Cox, 50, s. c.; Rocke *v.* Hart, 11 Ves. 58, 61 (*semble*); *Ex parte* Watson, 2 V. & B. 414; Heathcote *v.* Hulme, 1 J. & W. 122, 134 (*semble*); Brown *v.* Sansome, McClel. & Y. 427; Sutton *v.* Sharp, 1 Russ. 146; Moors *v.* De Bernales, 1 Russ. 301; Atty.-Gen. *v.* Solly, 2 Sim. 518; Docker *v.* Somes, 2 M. & K. 655; Mousley *v.* Carr, 4 Beav. 49, 53 (*semble*); Westover *v.* Chapman, 1 Coll. 177. But at the present day if the *cestui que trust* prefers to charge the trustee for principal and interest instead of the original fund with the profits, the court will usually give him compound interest, not as a punishment of the trustee, but because of a presumption that the trustee has made as much as compound interest, unless the contrary is made to appear beyond all doubt by a full and accurate disclosure of the accounts of the business. Walker *v.* Woodward, 1 Russ. 107; Heighington *v.* Grant, 1 Ph. 600; Jones *v.* Foxhall, 15 Beav. 388; Williams *v.* Powell, 15 Beav. 461; Penny *v.* Avison, 3 Jur. n. s. 62 (*semble*); Saltmarsh *v.* Barrett, 31 Beav. 349, 350 (*semble*); Burdick *v.* Garrick, 5 Ch. 233, 241, 243; Inglis *v.* Beaty, 2 Ont. Ap. 453; Barney *v.* Saunders, 16 How. 535; Hook *v.* Payne, 14 Wall. 252; *In re* Stott, 52 Cal. 403; Clark's Est., 53 Cal. 355; Merrifield *v.* Longmire, 66 Cal. 180; *In re* Eschrich, 85 Cal. 98; *In re* Thompson (Cal. 1894), 35 Pac. R. 991; Fall *v.* Simmons, 6 Ga. 265; Johnson *v.* Hedrick, 33 Ind. 129;

The ground on which this right rests is this. The employment in trade is unwarrantable; but if it turns out to have been profitable the *cestui que trust* has a right to follow the money, as it is said, into the trade. In such a case, the trade profits have in fact been produced by the employment of the money of the *cestui que trust*; and it would be manifestly unjust to permit the trustee to rely on his own misconduct in having exposed the funds to the risks of trade, as a reason for retaining the extra profits beyond interest for his own benefit. Even where no such extra profits have been made the *cestui que trust* is in general at liberty to charge his trustee, who has allowed the trust money to be employed in trade, with interest at £5 per cent, that being the ordinary rate of interest paid on capital in trade.[1] This right depends on principles the same, or nearly the same, as those which enable the *cestui que trust* to adopt the investment, and take the profits actually made.

Clark *v.* Anderson, 10 Bush, 99; Page *v.* Holman, 82 Ky. 573; Ringgold *v.* Ringgold, 1 Har. & G. 11, 80; Diffenderfer *v.* Winder, 3 Gill & J. 311; Perrin *v.* Lepper, 72 Mich. 454, 556; Bobb *v.* Bobb (Mo. 1877), 25 C. L. J. 126; Cruce *v.* Cruce, 81 Mo. 676; Ames *v.* Scudder, 83 Mo. 189 (affirming s. c. 11 Mo. Ap. 189); (see *In re* Davis, 62 Mo. 450; Williams *v.* Pettigrew, 62 Mo. 460; Scott *v.* Crews, 72 Mo. 261); Crowder *v.* Shackleford, 35 Miss. 321; Troup *v.* Rice, 55 Miss. 278; *In re* Ricker, 14 Mont. 153; McKnight *v.* Walsh, 23 N. J. Eq. 136, 24 N. J. Eq. 498; Schieffelin *v.* Stewart, 1 Johns. Ch. 620; Utica Co. *v.* Lynch, 11 Paige, 520; Garniss *v.* Gardiner, 1 Edw. 128, 130; Hannahs *v.* Hannahs, 68 N. Y. 610; Cook *v.* Lowry, 95 N. Y. 103; Berwick *v.* Halsey, 4 Redf. 18; Swindall *v.* Swindall, 8 Ired. Eq. 285; *In re* Harland, 5 Rawle, 313; Hazard *v.* Durant, 14 R. I. 25; Wright *v.* Wright, 2 McC. Ch. 185, 203; Myers *v.* Myers, 2 McC. Ch. 214, 265; Livingston *v.* Wells, 8 S. Ca. 347, 363; Cannon *v.* Apperson, 14 Lea, 553; Reed *v.* Timmins, 52 Tex. 84; Farwell *v.* Steer, 46 Vt. 678; Spaulding *v.* Wakefield, 53 Vt. 660, 664; McCloskey *v.* Gleason, 56 Vt. 264, 283; Perkins *v.* Hollister, 59 Vt. 348; *In re* Hodges (Vt. 1894), 28 Atl. R. 663.

Compound interest has been allowed in some jurisdictions purely on the ground of misconduct. Price *v.* Peterson, 38 Ark. 494; Hough *v.* Harvey, 71 Ill. 72; Jennison *v.* Hapgood, 10 Pick. 77, 104; Boynton *v.* Dyer, 18 Pick. 1; Miller *v.* Congdon, 14 Gray, 114; Elliott *v.* Sparrell, 114 Mass. 404; Salsbury *v.* Colt, 27 N. J. Eq. 492; Robert's App., 92 Pa. 407. See also Frost *v.* Winston, 32 Mo. 489.

Trust for Accumulation. — Compound interest is charged against a trustee who fails to comply with a direction to accumulate the income of the trust fund. Raphael *v.* Boehm, 11 Ves. 92, 13 Ves. 407, 593; Knott *v.* Cottee, 16 Beav. 77; Townend *v.* Townend, 1 Giff. 201; *In re* Emmet, 17 Ch. D. 142 (distinguishing Wilson *v.* Peake, 3 Jur. N. s. 155, and Amiss *v.* Hall, 3 Jur. N. s. 584); Rowan *v.* Kirkpatrick, 14 Ill. 1; Bond *v.* Lockwood, 33 Ill. 212; Hughes *v.* People, 111 Ill. 457; Clemens *v.* Caldwell, 7 B. Mon. 171; Voorhess *v.* Stoothoff, 6 Halst. 145; Perrine *v.* Petty, 34 N. J. Eq. 193; English *v.* Harvey, 2 Rawle, 305; Bowles *v.* Drayton, 1 Dess. 489; Edmonds *v.* Crenshaw, Harp. Eq. 224.

Disobedience of an order of Court. — Compound interest is also given where the trustee disregards an order of court directing payment. Walrond *v.* Walrond, 29 Beav. 586. — ED.

[1] See Lewin Trusts (5th Eng. ed.), 227, 276–278; Williams *v.* Powell, 15 Beav. 461; Schieffelin *v.* Stewart, 1 Johns. Ch. 620; 2 Story Eq. Jur. § 1277; Myers *v.* Myers, 2 M'Cord, 214, 266; Diffenderffer *v.* Winder, 3 Har. & G. 311; per Wells, J., in Marsh *v.* Renton, 99 Mass. 135; Trull *v.* Trull, 13 Allen, 407; Blauvelt *v.* Ackerman, 5 C. E. Green (N. J.), 148, 149; Hill Trustees (3d Am. ed.), 548 and note; Staats *v.* Bergen, 2 C. E. Green (N. J.), 554, 562, 563.

But the grounds on which, in all these cases, the right of election in the *cestui que trust* rests, wholly fail in a case where a trustee, having an option to invest either in £3 per cents, or on real security, neglects his duty and carelessly leaves the trust funds in some other state of investment. In such a case, the *cestui que trust* cannot say to the trustee: If you had done your duty I should now have had a certain sum of £3 per cents, or the trust fund would now consist of a certain amount of £3 per cents. It is obvious that the trustee might have duly discharged his duty, and yet no such result need have ensued.

Where a man is bound by covenants to do one of two things, and does neither, there in an action by the covenantee, the measure of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most beneficial to the covenantee; and the same principle may be applied by analogy to the case of a trustee failing to invest in either of two modes equally lawful by the terms of the trust.

It was contended at the bar that, in such a case, the trustee has by his neglect lost his right of electing between the two modes of investment; that he was always bound by the trust to exercise his discretion in the mode most beneficial for the objects of the trust; and that, having omitted to do so at the time when the option was open to him, he can no longer do it when he is called to account for his neglect, and when he can no longer exercise an unbiassed and impartial option. The fallacy of this argument consists in assuming that, in the case supposed, the trustee is called on to exercise any option at all. He is not called on to exercise an option retrospectively; but is made responsible for not having exercised it at the proper time, for not having made one of two several kinds of investment. And a reason for his being in such case chargeable only with the money which should have been invested, and not with the £3 per cents which might have been purchased, is, that there never was any right in the *cestui que trust* to compel the purchase of £3 per cents. The trustee is answerable for not having done what he was bound to do, and the measure of his responsibility should be what the *cestui que trust* must have been entitled to, in whatever mode that duty was performed.

The ground on which Lord Langdale proceeded in the several cases before him appears to have been that when the trustee has failed to discharge his duty in either of the ways which were open to him, the *cestuis que trustent* may then exercise an option which certainly did not belong to them by the terms of the trust: *i. e.*, that if the trustee has failed to exercise his option, then the right of election passes to the *cestuis que trustent*, although not given to them by the instrument creating the trust. But on what foundation does this supposed right of the *cestuis que trustent* to exercise such an option rest? No such right can be derived from the principle that the *cestuis que trustent* are entitled to compel the trustee to do what he was bound to do, for he was not bound to purchase £3 per cents. Nor from the principle that they may follow the trust funds into their actual state of investment, or charge a higher rate of interest in consequence of such investment, for the foundation of the complaint is, that the funds have not been invested at all. The only plausible foundation for the doctrine which occurs to us is this: The trustee was bound to exercise his option not capriciously, but in the mode likely to be most beneficial to the *cestuis que trustent*. And their interests appear in the result to be best served by requiring an investment in £3 per cents. But this reasoning seems founded on a fallacy. The selection of the £3 per cents is thus made to depend not on any option in their favor which the trustee was originally bound to exercise; but on the accident of their subsequent rise in value, a principle of decision from which, with all deference, we differ. If such a principle were to be applied, then, as it was well put at the bar, if in the present case there had been a discretion to invest in railway shares, the *cestuis que trustent* might perhaps now fix on the shares of some particular railway which have risen very highly in value, and say the investment might have been and so ought to have been, on that particular security.

On the whole, therefore, we cannot discover any such right of option as is contended for in the *cestuis que trustent*, not on the ground of their being entitled by the terms of the trust to compel the trustee to make an investment in £3 per cents, for no such obligation was imposed on him; not on the ground of their being entitled to adopt or insist on any actual investment, for no investment was made; not on the ground of any obligation on the part of the trustees to select the £3 per cents as the most beneficial mode of investment, for the advantage of the £3 per cents arises from their accidental and subsequent rise in value, and not from any necessary superiority at the time when the investment ought to have been made.[1]

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[1] Knott *v.* Coffee, 16 Beav. 77 *Accord.*
See Andrew *v.* Schmitt, 64 Wis. 664. — ED.

SECTION V.

The Duty of Custody of the Trust-res.

MORLEY v. MORLEY.

IN CHANCERY, BEFORE LORD FINCH, C., FEBRUARY 15, 1678.

[*Reported in* 2 *Cases in Chancery*, 2.]

THE defendant was trustee for the plaintiff, an infant, and received for him £40 in gold; a servant of the defendant living in the house with him robbed his master of £200, and the £40 out of his house. The robbery, viz., that the defendant was robbed of money was proved; the sum of £40 was proved by only the defendant's oath.

LORD CHANCELLOR. He was to keep it but as his own, and allowed it on account; so in case of a factor; so in case of a person robbed, for he cannot possibly have other proof.[1]

JONES v. LEWIS.

IN CHANCERY, BEFORE LORD HARDWICKE, MARCH 18, 1750.

[*Reported in* 2 *Vesey*, 240.]

A DECREE had been against defendant's husband (to whom she was administratrix) for a general account of assets, and for payment of the balance.

Exception by defendant to the report; for that certain goods, which had been delivered by her to her solicitor, and offered to plaintiff, had been since stolen from her solicitor; for which she therefore was not accountable; that they came into her hands in nature of a trustee, who kept them as his own, and was robbed thereof, and should not be responsible. Coggs v. Bernard,[2] Morely v. Morely,[3] and the doctrine in Southcot's case,[4] long looked on not to be law.

E con. Plaintiff is not answerable for any loss by means of defendant's negligence; for she delivering the goods to her solicitor was a voluntary act, which she had no occasion to do, but should have kept them in her own hands. Though persons come by right of executorship or representation to the possession of goods, they are not empowered to entrust them to another; nor ought she to have detained them after the decree, which had determined the right; they are kept therefore at her peril.

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[1] Jobson v. Palmer, '93, 1 Ch. 71; U. S. v. Thomas, 15 Wall. 337, 343; Newsom v. Thornton, 66 Ala. 311 (*semble*); State v. Meagher, 44 Mo. 356; Fudge v. Durn, 51 Mo. 264; Stevens v. Gage, 55 N. H. 175; Furman v. Coe, 1 Cai. Cas. 96; Carpenter v. Carpenter, 12 R. I. 544; Mikell v. Mikell, 5 Rich. Eq. 220; McKnight v. McKnight, 10 Rich. Eq. 157 *Accord.*

But if a trustee negligently fail to put the trust property in a reasonably safe place, he is liable if the property is subsequently stolen. Cornwell v. Deck, 8 Hun, 122. See Lehman v. Robertson, 84 Ala. 489. — ED.

[2] Lord Ray. 909. [3] 2 C. C. 2. [4] 4 Co. 83.

LORD CHANCELLOR. I will now consider this case as if the robbery had been without any tender of the goods at all to the plaintiff. It is certain, that if bailee of goods, against whom there is an action of account at law, loses the goods by robbery, that is a discharge in an action of account at law; and it is proved (and, I think, reasonably), that if a trustee is robbed, that robbery properly proved shall be a discharge, provided he keeps them so as he would keep his own. So it is as to an executor or administrator, who is not to be charged further than goods come to his hands; and for these not to be charged, unless guilty of a *devastavit;* and if robbed, and he could not avoid it, he is not to be charged, at least in this court. How it would be at law I know not, for I know no case of that at law.[1] The defendant is administratrix: supposing these goods had been in her own custody, and she had been robbed, I am clear of opinion, if that fact be made out (which can only be by circumstances, as it is probably made out here), she ought to have been discharged of these goods; and that notwithstanding no tender thereof; for that was a superabundant act; for it is a decree against her husband not for delivery of the goods, but for a general account of assets, and nothing directed to be paid but what was found on the balance. The only doubt then is, that they were not lost out of her custody, but her solicitor's, where they were put by her for a particular purpose. I do not know that a bailee, executor, administrator, or trustee, are bound to keep goods always in their own hands. They are to keep them as their own, and take the same care; if therefore a man lodged trust-money with a banker, if lost in many cases the court has discharged the trustee, especially if lost out of the banker's hands by robbery. In the present case what has been done is, what she would have done with her own; leaving them with her solicitor in order to be delivered to plaintiff when proper so to do; and why might she not do that? It is the same as if they had been in her own custody; and there is no pretence that they were collusively put into the hands of her solicitor. It would be too hard to charge her with these things lost; this exception therefore must be allowed.[2]

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[1] See Crosse *v.* Smith, 7 East, 246, 258 per Lord Ellenborough. — ED.

[2] Raw *v.* Cutters, 9 Bing. 96; Job *v.* Job, 6 Ch. D. 562; Jobson *v.* Palmer, '93, 1 Ch. 71; McCabe *v.* Fowler, 84 N. Y. 314; Carpenter *v.* Carpenter, 12 R. I. 544; McKnight *v.* McKnight, 10 Rich. Eq. 157 *Accord.* — ED.

Ex parte OGLE. In re PILLING.

In Chancery, before Sir Wm. James, and Sir G. Mellish, L. JJ., May 30, 1873.

[*Reported in Law Reports,* 8 *Chancery Appeals,* 711.]

In this case there were two appeals from a decision of the Judge of the County Court at Manchester.

The question in dispute arose under a deed of assignment dated the 21st of October, 1864, by which David Pilling, a leather factor at Manchester, assigned all his property to Edward Smith, as a trustee for his creditors. The deed was assented to by the requisite majority of creditors, and was registered under the 192d section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134).

Mr. Ogle and other creditors charged the trustee with negligence and mismanagement of the estate, and claimed to surcharge him in the accounts which he had rendered in several particulars, and the charges were referred to the registrar to report on the facts. The effect of his report, dated the 7th of May, 1872, so far as material to the present appeal, was as follows: —

Item 1.[1] As to wine sold to the debtor or allowed to remain in his hands.

The trustee discovered on the 19th of November, 1864, that there were 519 bottles of wine and 84 of brandy in the debtor's possession unaccounted for. The trustee instructed his solicitor, Mr. Simpson, to take legal steps for the recovery of the property.

On the 3d of May, 1865, the value of the wine and spirits amounted to about £130. The trustee made several written and personal applications to his solicitor to recover the property; but no legal steps were taken. Most of the stock was consumed by the debtor. In August, 1866, he executed another deed of composition with his creditors for 3*d.* in the pound.

Mr. Simpson's managing clerk stated that the reason why more active measures were not adopted was that Mr. Simpson believed that the debtor intended eventually to pay for the wine, and that he wished to treat him in a friendly spirit and not hostilely.

The charges arising out of the report were brought before the Judge of the County Court, and his Honor made an order to the following effect on the items which formed the subject of appeal: —

Item 1. That the trustee should be surcharged with £130 as the value of the wine and spirits, with interest at £5 per cent from the 3d of May, 1865.

Mr. DeGex, Q. C., and *Mr. Bagley,* then opened the cross appeal: —

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[1] The report of the case on the other items is omitted. — Ed.

As to item 1: The trustee was not to blame in permitting the wine to remain in the debtor's possession. He did all that he could by placing the matter in the solicitor's hands. It is very doubtful whether the court, under the Act of 1861, had power to order a debtor to give up property which he kept possession of. At all events there is no authority for charging the trustee with interest on the value of the wine. A trustee is never charged with interest unless he has himself possessed and used the property. Tebbs *v.* Carpenter.[1] In Grove *v.* Price [2] no interest appears to have been charged, although the money was clearly lost by the trustee's negligence.

Sir William James, L. J. It appears to me that this was not merely a debt, but a deliberate breach of trust. No proceedings were taken against the debtor because he was a friend of the solicitor. The County Court Judge was, in my opinion, right in charging the trustee, not only with the value of the wine but with interest, on the ground that it was a breach of trust.

Sir G. Mellish, L. J., concurred.[3]

FIELD *v.* FIELD.

In Chancery, before Kekewich, J., December 1, 1893.

[*Reported in Law Reports* 1894, 1 *Chancery*, 425.]

The plaintiff, Joshua Field, tenant for life of a trust fund invested in the name of the defendants, the trustees, on a mortgage of a building estate, moved for an injunction to restrain the defendants from permitting the title deeds to remain in the custody of their solicitors, or, unless the deeds were deposited by the defendants at a bank in their joint names, from permitting the same to remain in the custody of any person or persons other than the defendants or one of them.[4]

Kekewich, J. This motion raises a question of practical importance, and one of extreme interest to solicitors, and still more to those numerous clients of theirs who are trustees. My first inclination was to say that a question of such a vast importance must be carefully considered, and that it would not be right to express an opinion upon it until after consideration, and in language carefully weighed; but further discussion has convinced me that I ought to dispose of this motion, not as dealing with an abstract question, but rather with reference to the circumstances of this particular case, instead of laying down any general rule. I have before me an affidavit of four gentlemen with regard to the convenience of the deposit of trust deeds with solicitors and the practice of the profession. These four gentlemen stand high in the profession, and it would be difficult to find four others better qualified to depose as to the practice and the convenience of business; but they and the notice of motion alike seem to me to evade what, to my mind, is the real point. A comparison has been made between the deposit of deeds in a solicitor's office and the deposit of them in a bank. The question is not whether the trust deeds may be conveniently deposited in a solicitor's office, or in a bank, or anywhere else, but whether the deeds ought to be under the personal control of the trustees. If solicitors are prepared to make in their own office, or elsewhere, arrangements for depositing trust deeds, so that they may be under the control of trustees, I cannot myself see that this is open to any objection, and the suggestion as to keeping the deeds at a bank has not much to do with the case, and only introduces confusion.

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[1] 1 Madd. 290.
[2] 26 Beav. 103.
[3] Harrison *v.* Mock, 10 Ala. 185, 16 Ala. 616 *Accord.* — Ed.
[4] The statement of facts is abridged, and the arguments omitted. — Ed.

The general principle, in my opinion, is that trustees must have their muniments of title, as well as their securities, under their own control. I have held in one case some time ago, Webb *v.* Jonas,[1] that that this was enough to prevent trustees investing on a contributory first mortgage, because trustees investing on any particular mortgage security are bound to have the trust money and the security in their own names, and if the money and the security are in the names of others they are not fulfilling that obligation. The same thing applies to documents and deeds in their possession. They are intrusted with the custody of them, and they are bound within reasonable limits to see that the deeds are kept in a safe place, and that no one else can take them away. But to that obligation there must be reasonable limits. In order to realize the trust estate, the deeds must be in the custody of the solicitor to the trustees. He has to make abstracts of them, to make an examination of the deeds abstracted, and, if the property is sold in lots, the purchasers must have the opportunity of examining the deeds with the abstracts, if they wish, and even a second and a third examination may be necessary before completion. It would be a monstrous thing to say that the trustees have to keep the deeds all that time in a box with perhaps three or four keys, so that if any purchaser wishes to consult the deeds all the trustees will have to attend in person. That strikes one immediately as showing that reasonable limits to the trustees' obligation should be applied.

In the present case I have the trustees of a will, having their trust fund invested on mortgage. It happens that the tenant for life under the settlement is the mortgagor, but that is immaterial for the present purpose. The mortgaged property is a building estate in course of development; we all know what that is. From time to time building agreements have to be prepared and leases granted, and the deeds have to be consulted in order to see, for instance, that the parcels are all right, or that the powers have been properly observed, or that the boundaries of a plot in a second intended lease do not overlap the boundaries in the first, and so forth. It is practically impossible to deal with such questions unless the solicitor to the trustees has the deeds. On the other hand, there is possible danger in that course Rules are made not only for the guidance of solicitors who are honest as in the overwhelming majority of instances they are, but also with reference to dishonest solicitors, of whom, unfortunately, there are some. It is extremely difficult to lay down any general rule, and to say where any general rule may be departed from. In my opinion it comes to this, — that the solicitor may do what is reasonable and may advise the trustees as to what is reasonable. If there is a trust shut up for years, as often happens, and there is nothing in it to be done, I do not see why the deeds should not be locked up in a box in a bank or a safe deposit, and the trustees keep the keys, and that is the proper course to pursue. If, on the other hand, they are wanted from time to time, I do not think the trustees are acting unreasonably in giving their solicitor power to do what is right and necessary for the despatch of business. If the particular business comes to an end and there is no further occasion to refer to the deeds, then they can be put into a safe place. I am now referring to title-deeds only. With regard to bonds and certificates payable to bearer, I have not the slightest doubt that they ought not to be under the control of a solicitor, or any other agent.[1] The trustees are responsible for them, and they must keep them, not necessarily in their own custody, but in some place where they cannot be got at without the consent of the whole body.

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[1] 39 Ch. D. 660.

I am not prepared to make any order on the motion; but the matter has been fairly argued, and therefore I make no order, except that the costs of the motion are to be costs in the action.

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[1] Matthews *v.* Brice, 6 Beav. 239 *Accord.* — ED.

SECTION VI.

The Duty not to Delegate the Trust to Another.

ANONYMOUS.

[*Reported in* 3 *Swanston,* 79, *n.* (*a*).]

SIR J. JEKYLL cited a late case at the Rolls, where one who was a trustee for a woman and her children did, with the woman's consent, assign his trust to another who was guilty of a breach of trust, and the first trustee decreed to make satisfaction, because trustees cannot divest themselves of their trust at their pleasure.[1]

MORTIMER *v.* IRELAND.

IN CHANCERY, BEFORE LORD COTTENHAM, C., JULY 29, 1847.

[*Reported in* 11 *Jurist,* 721.]

LORD CHANCELLOR.[2] The argument amounts to this, that the executor of a trustee is of right a trustee. Whether the property is real or personal estate is no matter, for suppose a man appoints a trustee of real and personal estate *simpliciter*, adding nothing more, this cannot make his representative a trustee. The case before the Master of the Rolls[3] was quite different, for there the court proceeded on the intention manifested, that the trust should be performed by the assigns of the survivor. The property may vest in the representative, but that is quite another question from his being trustee. The testator may select the heir to succeed to the trust, but he only can do so. Here there are two persons appointed trustees; both die; thus there is no trustee, and it is for the court to appoint new ones. The testator having given no indication of intention, the court must refer it to the Master. The decree of the Vice-Chancellor is right in its form. The appeal must be dismissed with costs.[4]

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[1] Hardwick *v.* Mynd, 1 Anst. 109; Adams *v.* Clifton, 1 Russ. 297 *Accord.* — ED.

[2] Only the opinion of the court is given. A testator appointed A. and B. his executors and trustees, but made no mention of their heirs or executors. A., the surviving trustee, devised the trust property to C., his executor. The question was whether C. could execute the trust originally vested in A. and B. — ED.

[3] Titley *v.* Wolstenholme, 7 Beav. 425.

[4] *In re* Ingleby, L. R. 13 Ir. 326 (where the heir of the original trustee was not permitted to perform the trust) *Accord.* — ED.

COOKE *v.* CRAWFORD.

IN CHANCERY, BEFORE SIR LANCELOT SHADWELL, V.C., JULY 12, 1842.

[*Reported in* 13 *Simons,* 91.]

BILL by the devisee of William Hall the younger, for specific performance of a contract of purchase.[1]

THE VICE-CHANCELLOR. I am of opinion that the demurrer in this case must be allowed; for it is plain that the persons whom the surviving trustee has thought proper to appoint to execute the trusts of the testator's will, are persons to whom no authority was given for that purpose by the testator, and there is no case in which a person not mentioned by the party creating the trust has been held entitled to execute it.

I have always understood, ever since the point was decided in Hawkins *v.* Kemp[2] (or, rather was, as the judges said in that case, properly abandoned by the defendant's counsel as not capable of being contended for), that, where two or more persons are appointed trustees, and all of them, except one, renounce, the trust may be executed by that one. That decision, if it may be so called, has been approved of by Lord Eldon and other judges.

Now, in the present case the testator has devised his estates in the county of Lincoln to his son, William Hall, and his friends, James Burkitt and William Woolley, upon trust that they and the survivors or survivor of them or the heirs of such survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell his estates either by public auction or by private contract, and either altogether or in parcels, for such price or prices as they should consider the value thereof; and, for the purpose of effecting any and every such sale, he has empowered his trustees and their heirs to enter into and execute all necessary contracts, conveyances, and other assurances to or in favor of the purchaser or purchasers of his estates. Then he proceeds to declare that the written receipt or receipts of the trustees, or of the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, shall be good discharges to the purchasers.

It is observable that the testator has not used the word 'assigns' either in the clause in which he has created the trust for sale or in either of the two clauses that follow it, in which he points out the machinery by which the sale is to be effected. He does not introduce that word until he begins to speak of something that is to be done after the sale has taken place, that is, until he declares the trusts upon which the proceeds of the sale are to be held. Therefore, it is plain that when William Hall, who, by the disclaimer of Burkitt and Woolley, became the sole trustee, thought fit to devise the legal estate that was vested in him, he did an act which he was not authorized to do.

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[1] Only the opinion of the court is given. — ED.

[2] 3 East, 410.

And here I must enter my protest against the proposition which was stated in the course of the argument that it is a beneficial thing for a trustee to devise an estate which is vested in him in that character. My opinion is that it is not beneficial to the testator's estate that he should be allowed to dispose of it to whomsoever he may think proper; nor is it lawful for him to make any disposition of it. He ought to permit it to descend, for, in so doing, he acts in accordance with the devise made to him. If he devises the estate, I am inclined to think that the court, if it were urged so to do, would order the costs of getting the legal estate out of the devisee, to be borne by the assets of the trustee.[1] I see no substantial distinction between a conveyance by act *inter vivos*, and a devise; for the latter is nothing but a *post mortem* conveyance; and, if the one is unlawful, the other must be unlawful.

It appears to me that, as my decision in Bradford *v.* Belfield[2] has been acquiesced in, the question raised by the demurrer in this case is concluded by that decision: but, if it is not, then the authority of Townsend *v.* Wilson[3] is binding on the point. And my opinion is that the plaintiffs, who may be properly called the assigns of William Hall, the sole acting trustee of the testator's will, are not the persons to execute the trusts of that will: consequently, I shall allow the demurrer.[4]

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[1] But see Wilson *v.* Bennett, 5 De G. & Sm. 475, 479. See further the last paragraph of note 4 on this page. — Ed.

[2] 2 Sim. 264.

[3] 1 B. & Ad. 608, and 3 Madd. 261.

[4] If property is vested in A. and his heirs, upon a special trust, the heir of A. is competent to execute the trust. *Re* Morton, 15 Ch. Div. 143; *Re* Cunningham, '91, 2 Ch. 567. But the trust cannot be executed by an assign of A. under a conveyance *inter vivos*. Y. B. 15 Hen. VII. 11-22; Keilw. 43, b., Sugd. Powers (8th ed.) 893 s. c.; Y. B. 19 Hen. VIII. 9-4; Bradford *v.* Belfield, 2 Sim. 264; Titley *v.* Wolstenholme, 7 Beav. 425, 434-436; Hall *v.* May, 3 K. & J. 585, 589; Whittlesey *v.* Hughes, 39 Mo. 13; Pickett *v.* Jones, 63 Mo. 195, 199. See also Wilson *v.* Towle, 36 N. H. 129; Suarez *v.* Pumpelly, 2 Sandf. Ch. 336; Seely *v.* Hills, 49 Wis. 473. Nor by a testamentary assign. Cooke *v.* Crawford, *supra*; Wilson *v.* Bennett, 5 De G. & Sm. 475; Hall *v.* May, 3 K. & J. 585, 587; Stevens *v.* Austen, 3 E. & E. 685; Druid Co. *v.* Oettinger, 53 Md. 46, 59. Cooke *v.* Crawford, *supra*, was rejected as an authority by Sir George Jessel, M. R., in Osborne *v.* Rowlett, 13 Ch. D. 774. But in *In re* Morton, 15 Ch. Div. 143, the Court of Appeal (James, Bramwell, and Baggallay, L. JJ.) was inclined to stand by Cooke *v.* Crawford. And this inclination was followed in Ireland in *In re* Ingleby, L. R. 13 Ir. 326.

If, however, property is vested in A., his heirs and assigns, upon a special trust, a devisee of A. may, as a testamentary assign, execute the trust. Titley *v.* Wolstenholme, 7 Beav. 425; Ashton *v.* Wood, 3 Sm. & G. 436 (*semble*); Hall *v.* May, 3 K. & J. 585; Whittlesey *v.* Hughes, 39 Mo. 13 (*semble*). But an assign by act *inter vivos* cannot take the office of trustee. Titley *v.* Wolstenholme, 7 Beav. 425, 434-436.

Inasmuch as by the Conveyancing Act, 1881, § 30, a devise by a trustee is inoperative, and the title of a sole trustee, or a sole surviving trustee, passes to his personal representatives (*supra*, 346), who are to be deemed in law his heirs and assigns, within the meaning of all trusts and powers, the question raised in the principal case cannot again come up in England. In some of our States the title of a sole trustee of realty is not devisable, and does not descend to the heir, but vests in the court. — Ed.

DOILY *v.* SHERRATT.

IN CHANCERY, BEFORE HON. JOHN VERNEY, M. R., MICHAELMAS TERM, 1735.

[*Reported in* 2 *Equity Abridgment*, 742.]

A. BY will appoints two trustees, to whom and their heirs, executors, and assigns, he devises his real and personal estate on several trusts; and in case one die, then the other to execute the same. During their joint lives if one refuse to act, the other cannot act without him; but the trust devolves upon the court.

IN THE MATTER OF WADSWORTH.

IN CHANCERY, NEW YORK, BEFORE R. H. WALWORTH, C., NOVEMBER 15, 1847.

[*Reported in* 2 *Barbour, Chancery,* 381.]

THIS case came before the chancellor upon the petition of James S. Wadsworth and Elizabeth Wadsworth to remove W. W. Wadsworth as one of the executors and trustees under the will of his father, and to appoint another trustee in his place, so far as related to the trust created for the benefit of the petitioner, E. Wadsworth. The testator died in 1844, and all the trustees accepted the trust. In 1846, W. W. Wadsworth became of unsound mind, and was found to be a lunatic upon a commission issued to inquire into the fact.[1]

THE CHANCELLOR. The common law has made no provision for the execution of a joint trust by one of the trustees, where the co-trustee, by reason of lunacy or other inability, becomes incompetent to execute the trust. This, therefore, appears to be a proper case for the interposition of the court to remove the lunatic trustee, under the provisions of the revised statutes; so that the trusts, both as to the residuary estate given to the daughter, and as to that given to the grandson of the testator, may be executed, either by the remaining trustee, or by him and such other person as may be substituted in place of the lunatic.

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[1] The statement of facts and the opinion are abridged. — ED.

SWALE *v.* SWALE.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JUNE 28, 1856.

[*Reported in* 22 *Beavan,* 584.]

THE MASTER OF THE ROLLS.[1] I think the plaintiff is entitled to a receiver. What has taken place is thus described in the answer: Joseph Swale and Henry Anderson ask Mr. Holden to concur with them in making certain investments of the trust property. Mr. Holden, disagreeing with them, refused to concur. Thereupon, they continued to act in the trusts, without conferring with or consulting him. It appears also, that they have actually advanced money on certain securities, omitting the name of Mr. Holden, and that in one case they have taken a security in the name of one only. This court cannot approve of one trustee investing trust money in his own name exclusively of the others.

It is suggested, that one executor may act without the concurrence of the others; but it is impossible to say that this can be treated as an executorship account. The testator died four years and a half ago, and this transaction seems to have taken place, not in their character of executors, but in their character of trustees. I think that the plaintiff, who is interested in the property, is not to be excluded in this manner.

The answer of the two trustees is this: They say, that if Mr. Holden will concur with them, they will be exceedingly happy to go on and act together, but that if he differ from them, then that they must act for themselves. Considering the manner in which this court deals with trustees, whenever a breach of trust is committed, and the way in which Holden might be involved in one, it seems not unreasonable that he should insist on his view of the case being adopted, or, at least, that the view of the other two trustees should not control his.[2] The testator intended to have the assistance and discretion of three trustees, but here, as it sometimes happens, they do not act amicably together, their united assistance and discretion cannot be obtained, and the majority act alone in the administration of the trust. In that state of things, the plaintiff is entitled to have the receiver appointed.

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[1] Only the opinion of the court is given. — ED.

[2] A majority cannot determine the administration of a private trust. Sloo *v.* Law, 3 Blatchf. 459; Loud *v.* Winchester, 52 Mich. 174; Hill *v.* Josselyn, 21 Miss. 597; Green *v.* Miller, 6 Johns. 39; Philadelphia Trust *v.* Philadelphia Co., 139 Pa. 534; Low *v.* Perkins, 10 Vt. 532. Unless authority to administer the trust is expressly given to the majority by the instrument creating the trust, as in Attorney-General *v.* Cuming, 2 Y. & C. 139, or is reasonably to be implied from the peculiar nature of the trust, as in Sloo *v.* Law, 3 Blatchf. 459.

In public trusts the will of the majority of the trustees controls. Wilkinson *v.* Malin, 2 Tyrwh. 544; Perry *v.* Shipway, 4 De G. & J. 353, 1 Giff. 1; Cooper *v.* Gordon, 8 Eq. 249; Sloo *v.* Law, 3 Blatchf. 459; Scott *v.* Detroit, 1 Doug. (Mich.) 119; Hill *v.* Josselyn, 21 Miss. 597; Green *v.* Miller, 6 Johns. 39; Low *v.* Perkins, 10 Vt. 532. — ED.

A necessity is shown for some interposition to protect this property, not merely for the sake of the two tenants for life, but for the interest of the persons who may hereafter become entitled, who are not *sui juris*, and are a class at present unascertained.

LANE *v.* DEBENHAM.

In Chancery, before Wigram, V. C., June 23, 1853.

[*Reported in* 11 *Hare*, 188.]

Vice-Chancellor.[1] — The main question is, whether or not, there being a direct trust to raise £2,000 by sale or otherwise, — and thus a discretion to be exercised, and one of the trustees being dead, — it is thereby rendered impossible for the surviving trustee to execute this trust without the direction of the court.[2] The money, it is clear, must be raised; can the surviving trustee raise it by means of a sale, or is it necessary to come to the court in order that the court may exercise its discretion whether it is to be by sale, by mortgage, or by some other appropriation?

Mr. Walker has argued, that, whether the case be one of a power or a trust, if it be confided to two persons, or if it be a mere trust for sale, if it be said that the sale is to be made by two persons, a survivor of the two can never execute it. The argument proceeds, as it appears to me, upon an entire disregard of the distinction between powers and trusts. No doubt, where it is a naked power given to two persons, that will not survive to one of them, unless there be express words, or a necessary implication upon the whole will, showing it to be the intention that it should do so. But the ground of that rule is, that, where the testator has disposed of his property in one direction, subject to a power in two or more persons enabling them to divert it in another direction, the property will go as the testator has first directed, unless the persons to whom he has given the power of controlling the disposition exercise that power. He, therefore, to whom the testator has given the property, subject to having it taken from him by the exercise of the power, has a right to say that it must be exercised *modo et formâ*. It is therefore a rule of law, that, in all cases of powers, the previous estate is not to be defeated unless the power be exercised in the manner specifically directed. When, on the other hand, a testator gives his property, not to one party subject to a power in others, but to trustees, upon special trusts, with a direction to carry his purposes into effect, it is the duty of the trustees to execute the trust; — thus, if the direction be to raise a certain sum of money, the estate is thereby at once charged, and it becomes the duty of the trustees to raise the charge so created. If an estate be devised to A. and B. upon trust to sell, and thereby raise such a sum, it is I think, a novel argument, that, after A.'s death, B. cannot sell the estate and execute the trust.

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[1] Only a part of the opinion of the court is given. — Ed.

[2] The plaintiff, as surviving trustee, had caused the property to be sold at auction, and the defendant Lane was the purchaser. The defendant then raised the objection that the plaintiff could not lawfully perform the trust for sale. — Ed.

In Nicloson *v.* Wordsworth[1] and Crewe *v.* Dicken,[2] and that class of cases, the question was a different one, — whether, under a devise to several persons, upon trust to sell, — where the sale takes place in the lifetime of one who has released or disclaimed the trust, the other trustees in whom the estate is vested by such release, can execute the trust. In Crewe *v.* Dicken, there was a gift to A. and B., in trust that they and the survivor of them should sell. One disclaimed, so that in fact the sale was not made by the survivor, and the question was whether the other trustee could sell. Mr. Walker said, that that class of cases turned on the construction given to the word survivor; but it was not only that, — it was a question whether, in an event not contemplated by the testator, a person who was acting in the trusts, and in whom the devised estate was vested, could make a good title. In Nicloson *v.* Wordsworth, Lord Eldon said, he had not much doubt, and that in his own case, if he were himself the purchaser, he would not reject the title on that ground alone. Where there is a power given to A. and B., and no estate given to them, if A. dies or renounces, B. alone cannot make a title. Lord St. Leonards thus states the rule: "It is regularly true at common law, that a naked authority given to several cannot survive;"[3] and he adds, "the same doctrine applies to powers operating under the Statute of Uses;" and he cites the case from Dyer, "where *cestui que use* in fee, before the Statute of Uses, willed that his feoffees A., B., and C. should suffer his wife to take the profits for her life, and that after her decease the premises should be sold by his said feoffees, — one of the feoffees died, and then the wife died:" and it was ruled that the survivors could not sell. But if an estate be given to two persons, upon trust to sell, there is no doubt the survivor may sell. The case is then within the rule put by Lord Coke, and which I am not aware has ever been disputed, that "as the estate, so the trust shall survive."

The trustee has, in this case, executed the duty which the trust has cast upon him; and I am asked by the defendant to say, that, in doing so, he has committed a breach of trust, because he has proceeded to raise the money after the death of his co-trustee. If I were to lay down such a rule, where is it to stop? It would follow, that, whenever an estate is vested in two or more trustees to raise a sum by sale or mortgage, or even to sell by auction or private contract, the parties must, after the death of one of the trustees, come to this court for directions before they can execute the trust. The court has not better means of exercising the option than the party against whom the objection is taken, nor are its means so good. I think, as I have observed, that the fallacy of the argument on behalf of the defendant is in mixing together the rules applicable to bare powers or authorities, and those applying to interests.[1]

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[1] 2 Swanst. 365.

[2] 4 Ves. 97.

[3] 1 Sugd. Pow. 143.

JAMES GRAHAM AND WIFE *v.* A. KING AND OTHERS.

IN THE SUPREME COURT, MISSOURI, MARCH TERM, 1872.

[*Reported in* 50 *Missouri Reports,* 22.]

WAGNER, J., delivered the opinion of the court.

The respondents, Graham and wife, executed a deed of trust on a piece of land lying in St. Charles county to secure the payment of a debt, and one of the appellants, King, was made the trustee therein. The deed contained the usual and ordinary provisions, and after default was made authorized the "said King as trustee to proceed to sell the property," after having given the requisite notice in some newspaper published in St. Charles county. Payment not being made when the note became due, King advertised the property for sale in the St. Charles *Democrat*, a German newspaper, but the notice was inserted in the English language.[2] At the sale, King, the trustee, was not present, but left the matter in the hands of his son, a minor. It is alleged that the property sold for greatly below its value, and an injunction was asked to restrain the trustee from making a deed to the purchaser at the sale. After hearing the proof the court below decreed a perpetual injunction.

The office and duties of a trustee are matters of personal confidence, and he must exercise a just and fair discretion in doing whatever is right for the best interest of the debtor. He must in person supervise and watch over the sale, and adjourn it, if necessary, to prevent a sacrifice of the property, and no one can do it in his stead, unless empowered thereto in the instrument conferring the trust. A trustee cannot delegate the trust or power of sale to a third person, and a sale executed by such delegated agent is void. Perry, Trusts, § 779, and notes. *Judgment affirmed. The other judges concur.*[1]

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[1] Attorney-General *v.* Glegg, Amb. 584; Watson *v.* Pearson, 2 Ex. 581, 594; Brown *v.* Smith, 46 L. J. Ch. 866 (*semble*); Peter *v.* Beverly, 10 Pet. 532; Lorings *v.* Marsh, 6 Wall. 337; Parsons *v.* Boyd, 20 Ala. 112; Saunders *v.* Schmaelzle, 49 Cal. 59; Gray *v.* Lynch, 8 Gill, 403; Gutman *v.* Butcker, 69 Md. 7; Franklin *v.* Osgood, 2 Johns. Ch. 1, 14 Johns. 527; Belmont *v.* O'Brien, 12 N. Y. 394 *Accord.*

So if one or more of several trustees disclaim, the others may perform the trusts. See *supra*, p. 230. — ED.

[2] The court decided that the notice should have been inserted in an English newspaper. The opinion on this point is omitted. — ED.

Ex parte BELCHIER. In re PARSONS.

In Chancery, before Lord Hardwicke, C., March 14, 1754.

[*Reported in Ambler*, 218.[2]]

On cross petitions, and exceptions to the assignment of Commissioners of Bankrupt, the case appeared to be: —

Mrs. Parsons was chosen assignee of the effects of her son, John Parsons, a bankrupt; and there being a large quantity of tobacco to be sold, she employed one Wiggan, a broker, to sell the same by auction. The money was paid to the broker, and after remaining in his hands for about ten days, he died insolvent; and the Commissioners were of opinion the assignee ought to bear the loss.

It was proved by several persons' depositions, that it is the common method of business to sell mercantile goods by auction, and to employ a broker, and for him to receive the money.

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[1] Taylor *v.* Hopkins, 40 Ill. 442; Grover *v.* Hale, 107 Ill. 638; Howard *v.* Thornton, 50 Mo. 291; Bales *v.* Perry, 51 Mo. 449; Vail *v.* Jacobs, 62 Mo. 130; Brickenkamp *v.* Rees, 69 Mo. 426; Spurlock *v.* Sproule, 72 Mo. 503; Powell *v.* Tuttle, 3 N. Y. 396 (only one of several trustees at the sale, — overruling King *v.* Stow, 6 Johns. Ch. 323): Fuller *v.* O'Neil, 69 Tex. 349, 82 Tex. 417; Hawey *v.* Steptoe, 17 Grat. 289 (*semble*); Smith *v.* Lowther, 35 W. Va. 300 *Accord.*

Connolly *v.* Belt, 5 Cranch, C. C. 405; Smith *v.* Black, 115 U. S. 308 (reversing s. c. McA. & M. 338, only one of several trustees present at the sale); Johns *v.* Sergeant, 45 Miss. 332; Tyler *v.* Herring, 67 Miss. 169; Dunton *v.* Sharpe, 70 Miss. 850 *Contra.*

The trust for sale cannot be delegated to a stranger, or to one or more but less than all of the trustees. Bulteel *v.* Abinger, 6 Jurist, 410; Pearson *v.* Jamieson, 1 Mc L. 197; Saunders *v.* Webber, 39 Cal. 287; Taylor *v.* Dickinson, 15 Iowa, 483 (*semble*); White *v.* Watkins, 23 Mo. 423; St. Louis *v.* Priest, 88 Mo. 612; Berger *v.* Duff, 4 Johns. Ch. 368; Hawley *v.* James, 5 Paige, 318, 487; Newton *v.* Brownson, 13 N. Y. 587 (*semble*); Brennan *v.* Willson, 71 N. Y. 502; Bohlen's Est., 75 Pa. 304; Fuller *v.* O'Neil, 69 Tex. 349; unless by the instrument creating the trust authority is vested in less than all. Taylor *v.* Dickinson, 15 Iowa, 483.

If from the general tenor of the instrument creating the trust, it is fairly to be inferred that the performance of the trust for sale was not intended to be limited to the original trustees, the sale may be made by their lawful successors. Bradford *v.* Monks, 132 Mass. 405; Fish *v.* Coster, 28 Hun, 64.

A trustee may delegate the performance of a merely ministerial act, *e. g.*, he may grant a power of attorney to execute a deed or contract, the contents of which have already been settled. Gillespie *v.* Smith, 29 Ill. 473; Telford *v.* Barney, 1 Greene, 575, 591; Keim *v.* Lindley, (N. J. 1895), 30 Atl. R. 1063; Hawley *v.* James, 5 Paige, 487; Blight *v.* Schenck, 10 Barr, 285; Bohlen's Est., 75 Pa. 304, 317.

See Skipwith *v.* Robinson, 24 Miss. 688; Black *v.* Erwin, Harp. 411. — Ed.

[2] 1 Keny. 38 S. C.

Lord HARDWICKE, Chancellor, after argument at bar: If Mrs. Parsons is chargeable in this case, no man in his senses would act as assignee under commissions of bankrupt. This court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own.

Courts of law, and equity too, are more strict as to executors and administrators; but where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses.

There are two sorts of necessities; 1st, Legal necessity; 2d, Moral necessity.

As to 1st, A distinction prevails where two executors join in giving a discharge for money, and one of them only receives it, they are both answerable for it, because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary.

2d, Moral necessity, from the usage of mankind. If trustee acts as prudently for the trust as for herself, and according to the usage of business.

If trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable.

So in the employment of stewards and agents: the receiver of Lord Plymouth's estate took bills in the country of persons who at the time were reputed of credit and substance, in order to return the rents to London: the bills were protested, and the money lost, and yet the steward was excused.[1] None of these cases are on account of necessity, but because the persons acted in the usual method of business.

Objection: The goods were in a warehouse, but it does not appear the broker had the key of the warehouse; if he had, he would be then in the possession of the goods; and if he had in such case embezzled any of them, Mrs. Parsons would not be liable for such loss. If she would not in such case of embezzlement, no more reason that she should in this case.

Objection: Mrs. Parsons herself might have received the money.

It is not usual to receive the money one's self; a question frequently happens, by reason of bankruptcy, as to goods, which are shipped but not imported, to whom they belong. In those cases, this court generally orders the goods to be sold, and the money paid into the bank, for the benefit of the parties who shall be entitled in the event. But yet the broker is the hand to receive the money first.

Objection: She might have appointed another person to receive it.

The answer to that is, *Nil agit exemplum, quod litem lite resolvit.*

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[1] 3 Atk. 480.

Objection: She might have taken security; but to do that upon every occasion would tend greatly to the hindrance of business.

Therefore of opinion, Mrs. Parsons ought not to be charged with the value of the goods.[1]

SPEIGHT *v.* GAUNT.

IN THE COURT OF APPEAL, JANUARY 19, 20, 1883.

[*Reported in* 22 *Chancery Division Reports,* 727.]

THIS was an appeal from a decision of Bacon, V. C., holding the defendant, who was an executor and trustee of the will of John Speight, liable to replace a sum of £15,275, part of the trust estate, which had been lost by reason of the default of one R. E. Cooke, a stockbroker, doing business at Bradford.

The facts were briefly as follows: There being a sum of £15,000 trust money on deposit at the bankers, the defendant proposed to invest it in securities of the corporations of Leeds, Huddersfield, and Halifax — securities authorized by the will — and employed Cooke to obtain £5,000 of the securities of each corporation. The Leeds corporation issued debentures and debenture stock; the two latter borrowed on debentures only.

There was no absolute necessity to employ a broker in the purchase of the securities.

On the 14th of February, 1881, Cooke called on the defendant and handed him a paper, which purported to be a bought-note, and was as follows: "John Cooke & Son, Exchange, Bradford, February 24, 1881. To the executors of the late John Speight. We have this day bought for you as per your order, subject to the rules of the London Stock Exchange, £5,000 Leeds Corporation debenture stock at 105½ commission, net £5,275; £5,000 Huddersfield Corporation ditto ditto at 100 commission, net £5,000, Halifax Corporation ditto ditto at 100 commission, net £5,000: total £15,275 account. Signed John Cooke & Son."

Cooke, on delivering the note, said that the payment was to be made the next day, and the defendant signed three cheques for the total amount to Cooke's order, who appropriated them to his own use, and on the 28th of March filed a liquidation petition, and absconded.[2]

JESSEL, M. R. — This is an appeal from the decision of Vice-Chancellor Bacon finding the defendant, Mr. Gaunt, who was a trustee, liable to make good some £15,000 which has been lost through the failure of the stockbroker employed by him to make investments on account of the trust.

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[1] *Ex parte* Turner, Mont. & M. 52; Edmonds *v.* Peake, 7 Beav. 239 *Accord.* — ED.

[2] The statement of the case is taken from 52 L. J. Ch. 504. The arguments are omitted and the opinions are abridged. — ED.

The questions which we have to decide are important not only on account of the amount in dispute, but also on account of the principles which ought to govern the court in deciding points of this nature.

In the first place, I think we ought to consider what is the liability of a trustee who undertakes an office which requires him to make an investment on behalf of his *cestui que trust*. It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words a trustee is not bound because he is a trustee to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own. It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the business in any other way. If it were otherwise, no one would be a trustee at all. He is not paid for it. He says, "I take all reasonable precautions and all the precautions which are deemed reasonable by prudent men of business, and beyond that I am not required to go." Now what are the usual precautions taken by men of business when they make an investment? If the investment is an investment made on the Stock Exchange through a stockbroker, the ordinary course of business is for the investor to select a stockbroker in good credit and in a good position, having regard to the sum to be invested, and to direct him to make the investment, — that is, to purchase on the Stock Exchange of a jobber or another broker the investment required. In the ordinary course, all that the broker can do is to enter into a contract, — usually it is for the next account-day. Of course you may, by special bargain, make it for cash or for any other day, but the ordinary course is for the next account-day. Before the account-day arrives the purchasing stockbroker requests his principal to pay him the money, because on the account-day he is himself liable to pay over the money to the vendor, whether a jobber or broker, and therefore he must have it ready for the account-day, and according to the usual course of business he sends a copy of the purchasing note to the principal stating when the money is required to be paid, and he obtains the money from him a day or two before the account-day. When he gets it he pays it over, if it is a single transaction, to the vendor, and if it is one of a number of transactions he makes out an account with his vendor and pays over or receives from him the balance on the transactions. It by no means follows, therefore, that he pays over to the vendor the sum received, indeed there may be a number of transactions, and if the balance is the other way, then he has to receive money on the account, but he must in any case have the money in order to keep himself out of cash advances. It is after payment, and very often a considerable time after payment, that is, several days, that he gets the securities perfected. If they are shares or stock in a company or railway or other company, it may be a considerable time before the transfers are lodged at the office, and it is not until the matter is ready for completion that he gets the transfer and the certificates. But in all cases, except in the case of consols and a few other such stocks, there is some interval between the payment of the purchase-money and the obtaining of the security, or of the investment purchased.

If, therefore, a trustee has made a proper selection of a broker, and has paid him the money on the bought-note, and, by reason of the default of the broker the money is lost, it does not appear to me in that case that the trustee can be liable. Indeed it was not argued in this court that he would be liable, and I have said what I have said upon the subject more on account of an observation reported to have been made by Vice-Chancellor Bacon in the court below, than because of any argument that was addressed to us upon the point.

Having said what I have said on the general principle, I think it right to call attention to the authorities upon the subject, in order to show that I have given the fair result of the authorities as they stand. There is, in the first instance, the case of *Ex parte* Belchier. It was before Lord Hardwicke, and it is the leading case upon the subject. There it was the assignee of a bankrupt, but the same principle applies to the assignee of a bankrupt as to a trustee. A large quantity of tobacco belonged to a bankrupt, and the assignee employed a broker to sell it, the money was paid to the broker, and ten days afterwards he died insolvent. The commissioners fixed the assignee with the loss. He appealed to Lord Hardwicke, and it was proved that it was the common practice to sell mercantile goods by auction, and to employ a broker, and for him to receive the money. That was the ordinary course of business. It would be the same thing if a trustee sold goods by auction, the auctioneer would receive the money, and as regards certain transactions an auctioneer is called a broker. Lord Hardwicke says: "If Mrs. Parsons is chargeable in this case, no man in his senses would act as assignee under commission of a bankrupt. This court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own." He says, "not to strike a terror into mankind" — it is rather rhetorical, but he means not to discourage respectable people from accepting the office of trustee. Then he says: "Courts of law, and equity too, are more strict as to executors and administrators." I must say I do not concur with this observation. I think in modern times the courts have not distinguished between assignees, executors, and trustees, but they have put them all together and considered that they are all liable under the same principles, but that is only a bye point. Then Lord Hardwicke goes on to say: "But where trustees act by other hands, either from necessity or conformably to the common usage of mankind, they are not answerable for losses." That of course means where they act by other hands and properly choose the hand by which they act. Now what is meant by "either by necessity or conformably to the common usage of mankind"? It means where in the ordinary course of business transactions, an agent is employed. A gentleman, for instance, who has rents to collect as a rule employs a rent collector. He might go round himself and collect them, but he does not do so. It is the common usage of mankind in such a case to employ an agent to do it.[1] So a man who buys stock on a Stock Exchange employs a stockbroker, and there it is absolutely necessary for him to do so; he cannot buy himself, but even if he could it is usual to employ a stockbroker. Then Lord Hardwicke goes on: "Secondly — moral necessity, from the usage of mankind. If a trustee acts as prudently for the trust as for herself and according to the usage of business. If a trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable. So in the employment of stewards and agents; the receiver of Lord Plymouth's estate took bills in the country, of persons who at the time were reputed to be of credit and substance in order to return the rents to London. The bills were protested and the money lost, and yet the steward was excused. None of these cases were on account of necessity, but because the persons acted in the usual method of business." Then he answers a little further down the objection that Mrs. Parsons herself might have received the money. The answer is that it is not usual to receive the money one's self. Then he says: "A question frequently happens by reason of bankruptcy as to goods, which are shipped but not imported, to whom they belong. In those cases this court generally orders the goods to be sold and the money paid into the bank, for the benefit of the parties who shall be entitled in the event. But yet the broker is the hand to receive the money first." Then there was an objection that "she might have taken security, but to do that on every occasion would tend greatly to the hindrance of business." That seems to me to go the whole length we are required to go here, and to establish the general principle. . . .[2]

I now come to the point upon which the case was decided and on which it was argued before us. I must say as I read the pleadings that the law is stated in conformity with that which I have been laying down. The accusation against the trustee is one of negligence. It is called "gross negligence;" that does not matter, negligence is the charge made against the trustee, and the question is whether he has been guilty of negligence.

My view has always been this, that where you have an honest trustee fairly anxious to perform his duty and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done and which he believes is right in the execution of his duty, without you have a plain case made against him. In other words, you are not to exercise your ingenuity, which it appears to me the Vice-Chancellor has done, for the purpose of finding reasons for fixing a trustee with liability; but you are rather to avoid all such hypercriticism of documents and acts and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him.

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[1] The trustees' employment of an agent for collection was approved as reasonable in *In re* Brier, 26 Ch. Div. 238. — Ed.

[2] The Master of the Rolls here discussed with approval the cases of Bacon *v.* Bacon, 5 Ves. 331; Joy *v.* Campbell, 1 Sch. & Lef. 328; Clough *v.* Bond, 3 My. & Cr. 490.

There is no allegation in the statement of claim, although it has been argued, that Mr. Gaunt ought not to have employed a broker. I dismiss that argument at once. It is quite plain that he was entitled to employ a broker in the ordinary course of business, whether the purchase was on the Stock Exchange, or whether the securities were to be obtained from the corporation. The advertisements not only authorized the employment of a broker, but offered to pay the brokerage, and there was no occasion for a gentleman who was a trustee to do that himself which might properly in the ordinary course of business be done by another, and especially where the cost of employing that other would not fall on the trust estate. I think, therefore, that he was entitled to employ a broker even if he could have obtained the securities from the corporations direct.

It was said that it was the duty of Mr. Gaunt to pay the money direct to the bankers of the corporation, or at all events to make the cheque payable to the order of the corporation. If it is to be assumed against him that he knew the stocks were to be acquired from the corporations direct, I do not say whether or not he ought to have paid the broker. I reserve my opinion upon that question. If it were not so, if he had neither notice nor knowledge that the stocks were to be procured otherwise than on the Stock Exchange, then I think the argument that he might have paid it through the bankers falls to the ground. In the first place, as I said before, the usual custom is to pay your broker, and in the next place it by no means follows that the money would ever have reached the vendor; and, indeed, in the case where the purchase is in London, I suppose it would go to a London broker, so that I cannot see either according to the ordinary course of business or according to any possible mode of conducting business you could pay otherwise. It seems to me, therefore, that if you once arrive at the conclusion that Mr. Gaunt was uninformed by the bought-note that the purchase had been made in that way, there was no obligation on him to make any further inquiry. He trusted his broker, and he was not bound to ask the broker whether he had written a falsehood, whether he had really entered into a contract or not. The man told him in writing that he had, and he was entitled to trust him; and, as it seems to me, there was no obligation on him to make any further inquiry.

For these reasons it appears to me that the decision of the court below ought not to be affirmed.

LINDLEY, L. J. — The real importance of this case is, that it lies between these two propositions, — that a trustee cannot delegate his trust, and that on the other hand, he is entitled to employ persons to do that which an ordinary man of business would employ an agent to do. Now, looking at the matter fairly and properly as a business man would look at it, can it be said to be an improper thing on the part of a trustee who is desirous of investing £15,000 in this class of securities to go to a broker? That he might have acted otherwise is plain enough; but was it a reasonable and proper thing not to apply to the secretaries or treasurers of these corporations, but to employ a broker for that purpose? So far as the evidence goes, it appears to me that on the balance of the evidence it is impossible to say that this was an improper step for a trustee to take. Although business men can do these things for themselves, unless we can go the length of saying that the employment of Mr. Cooke was an improper delegation of the trust or an improper employment, it will follow that it was not an unreasonable thing or a breach of trust to employ a broker to do this kind of work; and the conclusion that I have arrived at on that point is that we cannot say the trustee, acting honestly, was not entitled to employ a broker to do this kind of business.

Now, assuming that the trustee was justified in employing Mr. Cooke, and assuming that he was not negligent in not having his suspicions aroused when this document was brought to him, the next question is, was he acting improperly in paying the purchase-money to the broker? That is to say, ought he, as a prudent man of business, to have paid it to somebody else, namely, to the principals from whom the broker ought to have got, but did not get, these securities, whether upon the Stock Exchange or otherwise? If the trustee had notice, and really did know that these things had not been bought on the Stock Exchange, it is quite possible that he ought so to have paid it. I say nothing about that. It might be that in that case the trustee would be bound to see further into the application of the money; but, misled as he was, and entitled as he was to treat these things as bought by the broker in the ordinary way of his business as a broker on the Stock Exchange, it appears to me that it is perfectly impossible to hold that he was bound to see to the application of the money, in the sense that he was bound to pay the persons with whom the broker negotiated the purchase. We know the way in which business is done through brokers in buying ordinary stock. If a broker buys £10,000 of stock there are sometimes half a dozen people from whom he gets the stock. It is not in the ordinary course of business for a buyer, whether a trustee or not, to pay to persons from whom the broker has bought; he pays the broker. He is entitled to do that by the ordinary course of business. I do not myself understand that there is any evidence that, in point of fact, a trustee or any other person employing a broker to buy could do it in any other way. As a matter of business I believe he could not. At all events, the evidence is conclusive that the ordinary practice in employing a broker on such occasions is to send a cheque to the broker. There was, therefore, no negligence in Mr. Gaunt doing so; there was no impropriety or breach of trust in his conduct up to this point.

Now, I do not propose to go through the authorities, but I will advert to two cases, because they have been brought to the attention of the court and they require notice. One is Bostock *v.* Floyer, in which Lord Romilly held that a man was responsible for the sum of £400 which he had given to his solicitor to invest. The solicitor had pretended to invest it on a mortgage of some copyholds, but he had not done so, and the money was lost, and the trustee was held responsible. As I understand it the *ratio decidendi* of the case was this, that it was not the ordinary course of business for a trustee to place money in the hands of a solicitor to invest. It was not a specific investment, it was handed to the solicitor, and in that point of view the case is intelligible enough upon the ground that it was not right for the trustee to hand over the money to the solicitor for the purpose of investment. The other case was Hopgood *v.* Parkin,[1] cited by Mr. Millar. That case certainly goes much further than I should have thought right; but in the result the case was appealed. An infant was concerned, and the Court of Appeal sanctioned a compromise on behalf of the infant.

I wish most emphatically to say that if trustees are justified by the ordinary course of business in employing agents, and they do employ agents in good repute and whose fitness they have no reason to doubt, and employ those agents to do that which is in the ordinary course of their business, I protest against the notion that the trustees guarantee the solvency or honesty of the agents employed. Such a doctrine would make it impossible for any man to have anything to do with a trust. I differ from the Vice-Chancellor upon the question of fact: the principles of law, which he stated in the first part of his judgment are entirely sound, but I differ from the conclusion at which he arrived on the bought-note, and so differing from him I cannot agree with the judgment which he pronounced.

BOWEN, L. J. — This is a case of the greatest possible importance, and I think it right, therefore, to add my own expression of opinion to the judgments which have been already given, not merely because of the importance of the case, but because during a portion of the arguments I certainly did not feel quite so clear as the rest of the court appeared to do, — not as to the law, which has throughout been admitted on all sides to be open to no doubt, but as to the correct inference from one particular point to be drawn by the tribunal that has to decide the case. However, I have come to a decided opinion about the matter, and as I have done so I think it is as well that I should express fully what that opinion is.

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[1] Law Rep. 11 Eq. 74.

Now, with regard to the law it is clear that a trustee is only bound to conduct the business of the trust in such a way as an ordinary prudent man of business would conduct his own. I agree with what was said by the Master of the Rolls in the opening part of his judgment, and the cases which he has cited seem to me to be conclusive upon the point. The truth is that the law upon the subject is clear, because it is based upon common sense. A trustee cannot, as everybody admits, delegate his trust. If confidence has been reposed in him by a dead man he cannot throw upon the shoulders of somebody else that which has been placed upon his own shoulders. On the other hand, in the administration of a trust a trustee cannot do everything himself, — he must to a certain extent make use of the arms, legs, eyes, and hands of other persons, and the limit within which it seems to me he is confined has been described throughout, both in the cases which have been referred to and the judgments which have preceded me, to be this: that a trustee may follow the ordinary course of business, provided he runs no needless risk in doing so. That is in substance what was laid down in the case before Lord Hardwicke of *Ex parte* Belchier. Lord Hardwicke's view, putting aside peculiarities of language, is based upon reason and common sense. In other words a trustee may not employ an agent where he should do the work himself; but he may employ an agent where there is a moral necessity, adopting the form of expression used in that case, that he should use the instrumentality of others, that is to say, he may use others if it is in the ordinary course of business to use others, and if he runs no needless risk in doing so. A similar sort of test is applied every day by commercial men in the business world to transactions which are carried on through agents. A contract of agency, a contract which a man makes with his agent when he commits anything to his hands is to a certain extent a personal one, and to the extent to which it is a personal one it cannot be delegated; but everybody knows that nothing is more common, — nothing is more certain than that a large portion of commercial business is performed through sub-agents. It is entrusted to the hands of an agent, not to do it himself, but to get it done, and in that class of cases, provided the agent chooses carefully the sub-agent, he really discharges the functions he is employed to discharge, and the proposition as to trustees or agents, that they cannot delegate, means this simply: that a man employed to do a thing himself has not the right to get somebody else to do it, but when he is employed to get it done through others he may do so. Now, applying that sort of reasoning to the present case, I begin with this, that a trustee who employs a broker to buy in the ordinary course of business on the Stock Exchange is justified in employing and in paying money to the broker whom he has employed. I fail to see what a trustee could be expected to do different. When the time comes for the completion of the purchase, the broker wants the money, and the payment to the broker is therefore one of the means of effectuating the completion of the purchase. It is wanted for that purpose. There is a moral necessity for it.

The first question argued in the case was whether Mr. Gaunt was entitled to employ a broker at all. I answer the question affirmatively in favor of Mr. Gaunt. I think it was a sensible thing for Mr. Gaunt to employ a broker. As to the choice of a broker I need not say anything. Enough has been said about that. But that does not exhaust of course the points we have to decide. Assuming that Mr. Gaunt was right in employing a broker, was he right in paying over so large a sum as £15,000 to him? Now a payment of that sort would be wise or unwise, I should say, according to whether there existed or did not exist a reasonable necessity for it, having regard to the ordinary course of business. If it was a transaction on the Stock Exchange, as I have said, and the money was wanted to complete the transaction, I think the trustee, Mr. Gaunt, would have been justified in paying it to his broker. If the purchase of the broker was made direct from the corporation I am by no means so clear, and I feel even more doubts, if I may say so, than my brothers who have preceded me on that point. If there had been no practical necessity for paying the broker it would be a large sum to pay him, and I cannot myself see that it is made out that such a course would be conformable to the ordinary usage of mankind in the sense in which those words are used by Lord Hardwicke and in other cases. I should feel the greatest doubt whether Mr. Gaunt would be justified in paying a broker on the market if the broker made the purchase direct from the corporation, and that was understood to be the bargain. But the question whether the payment was right or wrong depending on the nature of the transaction, how was Mr. Gaunt to know the nature of the transaction? He could only find it out from the broker himself. He could not walk into the market and ask the persons with whom Mr. Cooke might be supposed to be dealing whether it was true or not that Mr. Cooke had made a bargain with them, nor could he be expected to write to the corporation in the first instance to know whether he was justified in trusting his own broker. Of course he was justified in trusting his own broker on that point just as much as on the other points which have been discussed. I do not see what he could have done otherwise. If that is so the question we have to answer in this case is narrowed. It really resolves itself into this, was Mr. Gaunt informed by the broker in effect that the transaction which had been completed was a transaction of purchase and sale upon the Stock Exchange in such a way that Mr. Gaunt was justified in believing it? Now, the oral evidence in the case certainly does not show that Mr. Gaunt had any reason to doubt that this was an ordinary Stock Exchange transaction. But I do not myself rest very much upon the oral evidence, for Mr. Gaunt was the only person called on this question, and it may not be right to adopt the account he has given in his own favor of the conversation as minutely as if it were the language of a marriage settlement. But at any rate I see nothing in that evidence, and I have looked most carefully into it, to help the plaintiffs. There is nothing in it to show that Mr. Gaunt was informed that this was a purchase direct from the corporation.

With regard to what has been said as to the cases of Bostock *v.* Floyer and Hopgood *v.* Parkin,[1] referred to by Lord Justice Lindley, I entirely agree with him, and also with what has been said by the Master of the Rolls as to the subsequent alleged default in not requiring an explanation from Mr. Cooke of the delay which occurred after the money had once been paid.[2]

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[1] Law Rep. 11 Eq. 74.

[2] Affirmed in the House of Lords, 9 App. Cas. 1. The following extract from Lord Selborne's opinion is significant: —

"Thinking, therefore, that the employment of Cooke as a broker in this case, under the instructions actually given to him, was proper, and not inconsistent with the duty of the respondent as trustee, the next subject of inquiry is, whether it was a just and proper consequence of that employment, according to the principle of *Ex parte* Belchier, Amb. 218, that the trust money should pass through his hands.

"Upon this point I must first observe, that the case appears to me to be different from what it would have been if Cooke had entered into contracts with the several corporations for direct loans to them by the respondent, and had reported to the respondent that he had done so. The agency of a broker, as such, is not required to enter into a contract of that kind; and if the agency of a person who happens to be a broker is, in fact, employed to do so, I do not perceive why the consequences should be different from what they would be if a solicitor or any other person had been employed. The transaction could not be governed by the rules or usage of the London or any other exchange. There would be no moral necessity, or sufficient practical reason, from the usage of mankind or otherwise, for payment of the money to the agent; there would be no difficulty or impediment, arising from the usual course of such business, in the way of its passing direct from the lender to the borrower, in exchange for the securities; and if it should be found convenient to send it by the hand of a broker, or of any other messenger or agent, this might be done by a cheque made payable to the borrower or his order, and crossed, as is usual in direct dealings between vendor and purchaser, debtor and creditor, when payments of considerable amount have to be made. I think it right not to withhold the expression of my opinion, that such a case would fall within the principle of Rowland *v.* Witherden, 3 Mac. & G. 568, 574, and Floyer *v.* Bostock, 35 Beav. 603, 606, rather than that of *Ex parte* Belchier. On this subject I find myself in agreement with Bowen, L. J.; nor do I infer, from the judgments of Lindley, L. J., and Sir George Jessel, that either of them thought otherwise."

Lord Blackburn declined to commit himself on the propriety of a payment to the broker in the supposed case that the trustee knew that the securities were bought, not in the Stock Exchange, but direct from the corporation.

The doctrine of Speight *v.* Gaunt has been approved in subsequent cases. Bullock *v.* Bullock, 55 L. T. Rep. 703.

Similarly, delivery of money by a trustee to a solicitor to pay into court is lawful, since a solicitor is the proper person to make such payment. Mitchell *v.* Mitchell, 52 L. T. Rep. 178 (*semble*). The trustee was in fact held answerable for misconduct of solicitor because he was negligent in making inquiries as to the due deposit of the money by the solicitor. — ED.

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